Fact Finding Under *The School Boards and Teachers Collective Negotations Act of Ontario*

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Table of Contents

Foreword 4

Introduction 6

Data and Methodology 10

1. What Is Fact Finding? 11

2. *The School Boards and Teachers Collective Negotiations Act:* the Process of Fact Finding and the Fact Finder's Point of View 18

3. Does Fact Finding Help to Attain Settlements? 41

4. Does Fact Finding Delay Negotiations? 51

5. Can Fact Finding Prevent Strikes? 63

6. The Impact of Timing on the Effectiveness of Fact Finding 66

7. Summary and Conclusions 71

Bibliography 76

Appendix: Questionnaire Used in the Study 79

Foreword

Fact finding is an important dimension within the overall process of collective bargaining under *The School Boards and Teachers Collective Negotiations Act*. It is the only form of third-party assistance that becomes mandatory should the parties not be able to conclude a settlement prior to the expiry of the agreement in force. Once fact finding is initiated, the parties are able to project a specific date for the initiation of any possible legal sanction.

Fact finding was seen by those who drafted the legislation as a vehicle for introducing a healthy degree of rationality into negotiations before the commencement of a strike or lock-out. An objective third party – supported by the data resources of the Education Relations Commission – would consider the positions proposed by and arguments of the parties, who, by means of logical persuasion, would attempt to convince the fact finder of the justification of their respective stances. Fact finding was also viewed as an important weight in the balance between the desire of students and the public for an uninterrupted educational programme and the granting of sanction rights to teachers and trustees.

Since the *Act's* passage in 1975, approximately 1,000 fact finding appointments have been made. Expressed in another way, 42% of the jurisdictions involved in negotiations have had a fact finder appointed. Because of its prevalence, the process of fact finding has been considered formally several times in research efforts undertaken by Commission staff and by graduate degree candidates, and on those occasions when the legislation has been reviewed by government. The parties to bargaining, of course, review it with each and every assignment. Their assessments have tended towards the negative, with claims that fact finding, at best, causes a hiatus in negotiations and, at worst, is dysfunctional to progress towards a settlement.

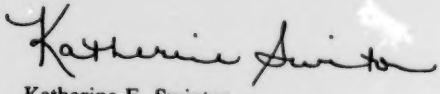
It is in this context that Professor Jackson has undertaken an examination of fact finding. He addresses important questions raised about this process: does fact finding help to attain settlements? does it delay negotiations? can it prevent strikes?.

The author is very well qualified to have conducted this research. Professor Jackson is a faculty member of the School of Business at Queens' University and

has a thorough grounding in the field of labour relations. Furthermore, he has had extensive experience as a fact finder for the Education Relations Commission, often having been assigned to jurisdictions considered potentially problematic. As a consequence, he has brought to this study academic rigor tempered by pragmatic experience.

While the Commission funded this study, the author's viewpoints and conclusions do not necessarily represent the position of the Education Relations Commission. Nevertheless, the Commission welcomes the study as a significant contribution to the literature on collective negotiations and teacher-board bargaining in Ontario education. The Commission welcomes any comments or reactions which readers may have.

The Commission wishes to express its appreciation to Professor Richard Jackson for preparing this study and sharing his observations and comments on the fact-finding process.



Katherine E. Swinton
Chair
Education Relations Commission
April, 1989

Introduction

At its inception in 1975, *The School Boards and Teachers Collective Negotiations Act* was an innovative and daring piece of legislation and, even after twelve years, is still unique in Canada. The Bill was innovative and daring in that it gave teachers the right to strike (and school boards the right to lock out) in a province where no other provincial public servant had (or yet has) the right to strike. However, while granting the teachers the right to strike, it made that right the culmination of a detailed and unusual process designed, amongst other things, (1) to encourage the parties to bargain; (2) to prevent unnecessary strikes and lockouts and thus protect the public interest; and (3) to inform the public and other interested parties of the nature of the dispute. Fact finding was to be "the backbone" of this entire process and the principal means through which the above goals were to be accomplished – at least, in the minds of the drafters of Bill 100.[1]

Fact finding under Bill 100 (as least, as it was envisaged by the drafters of the legislation) is in the tradition of the conciliation process set out in the *Industrial Disputes Investigations Act* of 1907. Influenced heavily by MacKenzie King, then head of the new federal conciliation service and (as a result of the Act) first Deputy Minister of Labour, the *I.D.I. Act* prescribed the intervention of a tripartite conciliation board in major labour disputes in public utilities: the board would attempt to conciliate but, in the event no agreement was attained, would file a report, subsequently to be made public, which outlined the nature of the dispute and the positions of the parties in a manner which was candid and which would be easily understood by the public. The belief was that public pressure precipitated by such reports would be an effective inducement on one or both of the parties to settle. Such a report was, in effect, a fact-finding report, as the term is used in Bill 100 and in the U.S.

Provision for tripartite conciliation boards found its way into all subsequent federal labour relations statutes and most of the provincial post-war private sector labour relations acts but, over time, this option fell more and more into disuse. At

1. B.M. Downie, *Collective Bargaining and Conflict Resolution in Education*. Industrial Relations Centre, Queen's University (1978), p. 109.

the present time, only two jurisdictions in Canada provide for mandatory fact finding (mandatory under certain circumstances): the *Canada Labour Code* and *Public Service Staff Relations Act* in the federal jurisdiction, and *Bill 100* in Ontario. It should be noted that fact finding under these statutes differs from the conciliation boards under other statutes in that it is done by one individual and not by a tripartite board.

The *I.D.I.A.* model was adopted by the Americans in drafting the terms of their *Railway Labour Act* of 1926. The *Taft-Hartley Act* of 1947 also made provision for the President to appoint a fact-finding board in a national emergency strike but, under this statute, the board could only report on the facts and could not make any recommendations for settlement.

With the rapid growth of collective bargaining in the American public sector during the 1960's and 1970's, many states included some form of fact finding in their disputes-resolution procedure. In this context, fact finding was seen as "a pragmatic compromise between the 'dual evils' of the right to strike and compulsory arbitration."[2] Fact finding in the United States found itself part of a wide variety of process sequences in that, under the various state statutes, it was married to a variety of other forms of intervention and dispute-resolution techniques.

Over the thirteen years since 1975, fact finding under Bill 100 has had a very mixed reception and experience. Subjected to a considerable amount of criticism from both sides of the table, but particularly from the trustees, it has been accused of shortcomings going well beyond the accusation that it did not work. Indeed, it was often suggested that it was an actual impediment to real bargaining. Other criticisms were that fact finding delayed the bargaining process at a crucial time, that some fact finders were unqualified or ignorant of local conditions, that they tended to be biased in favour of the other side, that they went beyond their mandate of "finding facts" by making recommendation. The parties' – and especially the trustees' – views of fact finding have been negative enough that it is clear that a good many of the parties have felt that fact finding should be dropped from the Bill-100 process entirely or, at least, made voluntary.

On the other hand, when systematically canvassed in 1979 for their views on the process, the parties responded that they viewed fact finding relatively positively.[3] While both parties agreed on this, their views were not entirely symmetrical and both suggested that some changes in the context of fact finding (for example, the timing) should be made. As well, fact finding has had many supporters over the years – people who, to varying degrees, were in good positions to observe and who felt that the process could and often did contribute positively to the Bill-100 bargaining process. In the main, these were E.R.C. personnel, many fact finders themselves, and even some teachers and trustees.

2. T. Kochan, Collective Bargaining and Industrial Relations (Irwin, 1980), p. 289
3. *An Evaluation of Fact Finding under the School Boards and Teachers Collective Negotiations Act, 1975*, Education Relations Commission (1979).

Thus, in its thirteen-year life, fact finding has been controversial. One also senses that it has not been well understood or, at least, that its nature has been misperceived in a number of different quarters.

This paper, then, is an attempt to explore the nature and, to the extent possible, to examine the efficacy of fact finding under the *School Boards and Teachers Collective Negotiations Act* of Ontario. It will examine the process in a variety of ways and will probe a number of different dimensions of fact finding. Recognizing that the principal goal of fact finding is to help the parties reach a settlement, it explores the impact of fact finding on negotiations, both pre- and post-fact finding and, particularly, on the attainment of settlements. It also examines fact finding in a procedural, tactical and strategic perspective from the point of view of the fact finder him/herself, an important point of view conspicuously absent from the fact-finding research. Overall, this paper attempts to articulate what fact finding under Bill 100 really is (and what it is not), how well or poorly it really does work, its strengths and weaknesses, and how it might work more effectively.

A word of caution is in order. Testing the efficacy of fact finding in the Bill 100 process is no easy task, for a number of reasons. First, the thirteen years during which fact finding has been used has been a period of instability in the teacher-board bargaining climate; indeed, there have been a lot of significant changes affecting the system, most not directly to do with fact finding but all having some – and in some cases, great – impact on the bargaining process and climate. The most obvious examples of this were the Ontario wage-restraint legislation, Bills 179 and 111, which affected negotiations during the 1982–83, 1983–84 and, to a lessened extent, 1984–85 rounds. Similarly, the federal wage and price controls affected negotiations for the first three years of the legislation. Bill 30 – funding of Roman Catholic schools – has had a dramatic impact on the entire Ontario system, both public and RCSS, an impact which has been directly reflected at the bargaining table in terms of both issues and climate.

Fact finding itself has changed over the years since 1975 as well. Not surprisingly, in the early years, fact finders had little experience with the process, as did the parties. In the intervening time, fact finders have developed a great deal more sophistication and, the evidence suggests, the nature of fact-finding reports has changed significantly. It is clear, too, that the parties themselves, having accumulated 13 years of experience with fact finding, now deal with it differently. They, too, are more sophisticated.

The fact-finding process, as it is used in the context of Bill 100, has also changed since 1975. Mainly as a result of the Matthews Commission[4] and its recommendations, fact finding has been used somewhat more discriminatingly since 1980 than during the first five years of the Bill 100 process, and pre-fact-finding mediation has been used more frequently.

Testing the efficacy of fact finding in Bill 100 is difficult also because fact finding serves a variety of purposes under the Bill, each of which may have a

4. *The Report of a Commission to Review the Collective Negotiations Process Between Teachers and School Boards*, Ontario (1980).

different measure of success. Hence, one must be careful in drawing conclusions. For example, some of the research has assumed that if fact finding actually aids in negotiations, then it should shorten bargaining time; accordingly, the impact of fact finding on the length of negotiations was tested. However, a factor which helps the parties find a settlement does not necessarily also shorten the negotiations. In fact, it *could* lengthen them. As well, if fact finding is designed to prevent strikes, there are a number of ways that could happen, and shortened negotiations might not necessarily be the result in every instance; indeed, the reverse might be true in some cases.

In other words, different purposes may have different and contradictory measures of success. The reality may be that, since every bargaining situation is in some respects unique, the particular blend of purposes that fact finding can serve in a given situation is also unique to that situation. Hence, it is dangerous to come to sweeping conclusions with respect to the effectiveness of fact finding when those conclusions deal with only one dimension or goal of fact finding and are based on quantitative analysis of aggregated data.

Data and Methodology

Data and information were obtained from a variety of sources for these purposes. A questionnaire was developed and sent out to each board and branch affiliate which had experienced fact finding in any of the years 1984-85, 1985-86, or 1986-87.[5] The questionnaire was accompanied by a letter from the Chief Executive Officer of the Education Relations Commission requesting that the questionnaire be filled out by the chief negotiator or, if that was not possible, by the person closest to the particular set of negotiations in which fact finding was experienced. Of some 306 questionnaires mailed out, 100 were returned, 61 by boards and 39 by branch affiliates. Two questionnaires were received from 15 of the boards.[6] At least one completed questionnaire was returned from a total of 85 of those parties undergoing fact finding in any of the three years, for an aggregate response rate of 33.2%. Response rates for the parties individually were 44.7% for the boards and 25.5% for the branch affiliates. In addition, a number of the parties were interviewed, either in the development of the questionnaire or as a follow-up to it.

A sample of twelve fact finders were interviewed. These individuals, while mainly experienced, did include several relative newcomers to the process. As well, a large number of fact finding reports were reviewed for both style, content, and strategy. These included both public and non-public reports.

Five staff members of the Education Relations Commission were interviewed, as was the E.R.C. Chairman from 1979 to 1987, Professor Bryan Downie.

Finally, the author has drawn on some of his own experiences as a fact finder under Bill 100.

5. The questionnaire appears in the Appendix.
6. These boards completed one for both secondary and elementary panels, since they had experienced fact finding in both during the 3-year period.

1.

What Is Fact Finding?

At this point, an attempt to begin to define fact finding may be appropriate. The following profile is derived principally from the research literature but is most useful for the purpose of constructing a basic model of fact finding as a labour disputes-settlement process. Out of this it will be seen that any definition of fact finding must be couched in generalities because of one central reality. The nature of fact finding varies widely, as a function of three sets of variables: (1) the particular disputes-resolution process which surrounds it, (2) the circumstances of the particular dispute with which it is concerned, and (3) the individual fact finder him or herself.

Within a very broad array of variants, then, fact finding at a minimum entails the entry into a bargaining dispute of a neutral third party who, after discussions with the disputing parties, issues a report which is usually made public and usually contains non-binding recommendations for a settlement of the dispute. A traditional rationale for fact finding is that

> . . . a neutral determination of the issues in dispute, particularly when coupled with recommendations for their settlement, will either coalesce public pressure upon the contending parties or will force the parties themselves to take a new view of their own and the public's interest.[7]

If the process works as envisaged above, the parties will have come to actual agreement on a new contract on their own. Hence, while the fact finder may have somehow helped push or pull them to that point, fact finding "retains an important element of voluntarism in the establishment of collective bargaining agreements."[8] In terms of the power of final decision, then, fact finding is the compromise between the "dual evils" of the right to strike and compulsory arbitration, although either of those events might follow fact finding at some point in the process.

In terms of its appearance and nature, this "compromise" process is, in a sense, a hybrid of arbitration and mediation. Given that the nature of any particular

7. C. Rehmus, "The Fact Finder's Role," *The Public Interest and the Role of the Neutral in Dispute Settlement*. Proceedings of the Inaugural Convention in the Society of Professionals in Dispute Resolution, Washington, D.C. (1973), p.35.

fact finding is a function of the three sets of variables noted above (the particular dispute-resolution procedure, the particular dispute, and the particular fact finder), fact finding can lie anywhere along a range between arbitration and mediation, in both a procedural and a substantive sense.

In terms of procedure, fact finding bears a resemblance to both other processes. As in arbitration, the parties make submissions to the fact finder, usually oral and written, a hearing is held, and an "award" is issued. As in mediation, however, the hearing is inquisitorial rather than adversarial in nature; that is, the fact finder can cross examine the parties and test their positions, functions which are usually left to the parties themselves in adversarial proceedings such as arbitration. In addition, the fact finder may (and probably will) meet with the parties *in camera* in order to probe for priorities, flexibility in the positions, hidden-agenda items and "bottom lines". Most importantly, fact finders' decisions become non-binding recommendations, not binding awards.

In a substantive sense, there may also be a significant element of either mediation or arbitration in the fact-finding process. First, during the fact-finding hearing, the fact finder may explicitly shift from the role of fact finder to that of mediator and attempt to "get a deal" right at the hearing. If she/he succeeds, no report is ever written because the dispute and the process both end at that point. Some dispute-resolution statutes make explicit provision for this transformation while most do not; some even require it (for example, the *Canada Labour Code* and the Ohio Public Employee Collective Bargaining Act). Whatever the legislation states, however, the transformation from fact finder to mediator can and usually does take place to some extent unless the legislation explicitly forbids it. The reaction of the parties and the results of these efforts obviously vary considerably.

The second dimension of mediation within fact finding is somewhat more subtle and very much more important. A subject of perennial debate amongst third parties involved in fact finding is the question, 'when formulating recommendations, is the fact finder looking for the "right" answer (that is, the recommendations which, in his/her personal judgement, are appropriate and correct under the circumstances) or is the fact finder looking for "the deal" (that is, what the parties will jointly accept regardless of whether or not the fact finder agrees with it)?' If the answer is the former, this suggests an "adjudicative" approach closer to that of the interest arbitrator whose award is binding in law. If it is the latter, then it suggests the mediator's, or the "accommodative", approach. Again, the research and the evidence from the field disclose that the actual blend of the adjudicative and accommodative modes varies according to the legislation, the particular dispute, and the particular fact finder.

From the above one can infer what fact finding is not. It is not to any great extent the finding of new facts, at least in the conventional sense of that term, and the presentation of those previously unknown facts to the parties that make fact finding effective. It is naive to suggest that a stranger to the situation could bring many new facts to the attention of parties who have been struggling with the issues

8. Ibid.

for months. As anyone who has ever done fact finding can attest, the parties themselves inevitably smother the fact finder in facts, data, and documents, albeit sometimes quite one-sided. Indeed, as one respected third party so aptly put it, " . . . with the accumulation of paper that occurs in this process, by the end of the hearing one has become a major fire hazard."

Negotiations do not break down because the parties lack facts. They break down because of frustration and anger, ego involvement with issues and positions, the inability or the unwillingness of one or both sides to cut through the obfuscation and confusion of the negotiations rhetoric in order to see the shape or direction of a settlement, and because negotiators are, in a sense, hostage to the (perhaps unrealistic) expectations and demands of their own constituents. Many of these problems are exacerbated, in the public sector, by extraordinary openness and added political pressures on both parties. It is with these problems, it is argued, that fact finding can often help, as will be set out and discussed in more detail later in the paper.

In a theoretical sense, the essence of effective fact finding seems to lie in (1) the judicious selection amongst a plethora of often-conflicting facts and sets of facts, a selection which itself requires judgments in a number of different respects; (2) analysis and interpretation of the relevant facts; (3) assessment of the needs, priorities and political realities faced by each of the parties and, *flowing out of all of the above, the fact finder's recommendations*; (4) candid comment by the fact finder about one or both parties' positions and approaches to negotiations.

It seems clear, both from the research and from experience in the field that, if anything in the fact-finding report spurs further negotiations and progress, it is principally the fact finder's recommendations. Assuming the recommendations are pragmatic, well supported and properly tailored to the realities of the bargaining situation, it is these, more than anything else, which induce the parties to move.

Fact finding, then, is not the finding of facts in the conventional or superficial sense of that term. If there is an element of presenting new facts to the parties, it lies much more in the act of confronting them with the unpleasant realities of their own positions and the outside world and presenting them with a proposed settlement. In effect, it is the presenting to the parties of a new perspective on the dispute. Therefore, it is suggested that, in so far as helping the parties is concerned, the term "fact finding" is very much a misnomer. More descriptive terms would be "advisory arbitration" or "written mediation", both of which, in a sense, fact finding is or can be. This is brought out at this point, not only because it underlines what fact finding is and is not, but because the "fact finding" label may very well create confusion in the minds of the parties, the public and, indeed, in fact finders themselves – confusion with respect to what fact finding is, what it can reasonably be expected to accomplish, and how best to approach it.

Finally, while the research literature does not seem to cover this aspect at all, it is clear (reading between the lines of the research as well as fact finder reports and interviews) that fact finding plays an important political role – at least, in public-sector labour disputes, and particularly where the right to strike exists at the end of the process.

For a government to give a set of public employees the right to strike is to take a major political risk – the risk of strikes which will inevitably subject the government to immense pressure, in various forms. In a sense, then, the process of fact finding places an extra agent at the table, *not* an agent of the state *as an employer* but, instead, a representative of the *people* who, while neutral (as between the two parties) will act as an intelligence source for the people. In this light, it can be seen that the term "fact finding" has a double meaning: while some facts (in a manner of speaking) are being found for the parties, the real facts are being found for the public.

More importantly, the fact finder will try to prevent ultimate breakdown which leads to strikes and lockouts. In this sense, too, a degree of control in the negotiations is exercised by someone other than the two parties, someone with the welfare of the public as a higher priority than either of the two parties may be demonstrating at that moment. This is, perhaps, an adaptation to Ontario education collective bargaining of Talleyrand's observation on the folly of statesmen who leave the conduct of war to the generals, which might be paraphrased as "education labour disputes are too serious to be left entirely to the negotiating parties themselves."

One other aspect of the process made clear in the research is that fact finding is a very flexible process and that its true nature is really a function of what the governing statute prescribes for the fact finder, for the parties and, most particularly, for what follows in the dispute-resolution process. That is to say, whatever processes follow fact finding can give either more or less centrality to the fact finder's recommendations, setting up varying degrees of incentive for the parties to accept them. For example, under Bill 100, where the parties are free to simply ignore the fact finder's recommendations and, ultimately, to impose sanctions on each other, there is relatively little pressure on the parties to seriously consider the recommendation.[9] Under certain other statutes, the parties are granted far less freedom to ignore the fact finder's recommendations.

The Ohio *Public Employee Collective Bargaining Act*, which came into effect in 1984, is such a statute. The parties are more constrained with respect to their reaction to fact-finder recommendations than are Ontario trustees and teachers but still have considerable discretion. Under the Ohio statute, a fact finder is automatically appointed if the parties have not reached agreement one month before expiry of the collective agreement. The fact finder has 14 days (extendable by the parties' mutual agreement) to complete the process and submit a report with recommendations for settlement. The fact finder is also expected to try to mediate during the fact-finding process. However, it is what *follows* fact finding in this process that is most interesting in this statute.

After receipt of the report, the parties have seven days to *reject* the fact finder's recommendations. Under the statute, this means that each party must explicitly vote

9. There can, of course, be mediation, at the behest of either the parties or the E.R.C. If mediation takes place immediately after the parties receive the report, and if the mediator chooses to use the fact finder's recommendations, then they are afforded more centrality and the parties have some extra incentives to accept them. In this respect, there can be a potential synergistic effect between fact finding and mediation. However, there is no evidence that this occurs on a systematic basis.

against the recommendations in a secret-ballot vote supervised by the State Employment Relations Board. In order to reject the recommendations, three fifths *of the total membership of each constituency* (for example, all teachers in the bargaining unit and all the trustees on the board of education) must vote against them. Should either or both of the parties reject the recommendations, then they continue the bargaining process and, ultimately, are free to impose sanctions. However, if both parties fail to reject by a three-fifths majority of the total voting constituency within seven days, then the fact finder's recommendations are deemed to have been accepted, and they, together with the issues not in dispute, become the new collective agreement.

Over the period 1986 and 1987, of the 1105 bargaining situations to which fact finders were appointed in Ohio, some 664 settled on their own before the hearing, another 101 attained mediated settlements during the fact-finding process, and 141 accepted or were deemed to have accepted the fact finder's recommendations. A total of 202 rejected the fact finder's recommendations.[10] One way of expressing this would be that, of the 1105 situations referred to fact finding, 82% settled successfully, while 18% rejected the recommendations.

Another interesting statutory variant wherein the parties have even less discretion than in Ohio is under the Iowa *Public Employment Relations Act*. Under that statute, once the parties have undergone fact finding and there is no agreement, the dispute will be referred (at the request of either party) to compulsory, final-offer selection. The most intriguing aspect of this process is that the arbitrator has *three* options from which to choose: the employer's final offer, the union's final offer, or the fact finder's recommendations. The record shows that, over the period 1975-82, fact finder recommendation were accepted *in toto* by the parties 72.3% of the time.[11]

Thus, the process of fact finding is a very flexible and adaptable one which takes its essential nature from the statute which surrounds it. Fact finding – and, specifically, the fact-finding recommendations – can be the central element of a disputes-resolution procedure where the parties are placed under significant pressure to deal seriously with them, or it can be a less important element where the parties are afforded a large degree of discretion in deciding to ignore the recommendations.

In summary, then, fact finding is generally seen as a form of third-party intervention in bargaining disputes which, in terms of the balance of decision-making power between the disputing parties and the third party, is a pragmatic compromise – or attempted compromise – between the right to strike and binding interest arbitration. In terms of process and substance, it is a blend of both arbitration and mediation, and every different fact finding can be a unique such blend. The heart of the fact finder's report – and the principal source of any impetus to negotiation progress – is the fact finder's recommendations. Politically, and also in terms

10. Edward Herman and Howard M. Leftwich, "Fact Finding in Ohio Public Sector Bargaining Revisited", *Labor Law Journal*, August, 1988, pp. 513-519.
11. Gallagher, Daniel and Veghlan, Peter. "The Effect of Statutory Impasse Schemes on the Acceptance of Fact Finding Recommendations: Evidence from New York and Iowa." *The Journal of Collective Negotiations*, Vol 13(2), 1984.

of the dynamics of collective bargaining, fact finding allows the public to sit at the table and, to some extent, to be protected from unnecessary strikes and lockouts. Finally, fact finding can be married to other elements in the statute which can profoundly affect its nature and role. A potential synergistic effect exists between fact finding and these other elements in terms of "helping", focussing or pressuring the parties towards settlement.

General strengths and weaknesses of fact finding (according to the U.S. research)

As noted above, the research literature suggests an ambivalence with respect to the effectiveness of fact finding as it has been experienced in the United States. While a number of the advantages, or goals, have been noted earlier, set out below is a comprehensive listing of both strengths and weaknesses.

Strengths

1. Fact finding can mobilize public opinion and, in so doing, force one or both of the parties to modify their positions and deal with each other (Rehmus).

2. Fact-finding recommendations can lead the parties to a settlement on difficult issues. Rehmus, amongst others, makes this point strongly with respect to the work of Presidential Emergency Boards operating under the *Railway Labor Act*.

3. Fact-finding recommendations, if not leading to complete settlement, can at least lead to a narrowing of the range on some issues and the elimination of other issues in the dispute.

4. Fact-finding recommendations can provide a face-saving device for the parties and, thus, help them cope with intraorganizational bargaining difficulties – that is, unreasonable or unrealistic demands being posed by their own constituents or factions thereof. This is true for both management and labour in the public sector (Northrup, Zack, Kochan).

5. Fact finding can provide a useful "cooling-off" period for the parties, forcing them to reappraise their situations and, in so doing, separating out the emotional and ego involvement that intense negotiations and impasse situations often generate. In this way, the parties' attitudes towards each other may improve, or at least not deteriorate any further (Zack).

6. Fact finding can enhance communications between the parties (Zack).

7. Fact-finding recommendations and statements can give both parties more room to manoeuvre by being aimed, for example, at the public budget authorities in a situation where labour and management largely agree on what needs to be done but where there are simply inadequate funds to accomplish that (Rehmus).

8. Fact finding, in contrast particularly to arbitration, is an extremely flexible and

adaptable form of third-party intervention which can be tailor-made to fit the peculiarities of many particular bargaining situation (Gallagher & Veghlan).

Weaknesses

1. Fact finding does not, in fact, lead to public pressure because, other than when an important strike appears to be imminent, neither the public nor the news media take an interest in fact-finding reports. This is a widespread finding in all the research on fact finding (Doherty).

2. The parties can tend to become more and more reliant upon fact finding over time – the so-called "narcotic effect" (McKelvey, Kochan).

3. Aware that they may (or will) have to go through fact finding at some point, the parties knowingly hold back concessions during prior bargaining and thus "chill" the negotiations (Lieberman).

4. The existence of fact finding may exercise a chilling effect of prior mediation as well, for reasons cited in No. 3 above. This may be true even when the terms offered by the employer are comparable in terms of community and professional standards. This argument states that the teachers, assuming that fact finders are motivated primarily by the desire to get a settlement, call for fact finding in order to extract just a little bit more than they already have from mediation (Zack).

5. Over time, the parties become less and less likely to incorporate fact-finder recommendations into their agreements, as they themselves become more sophisticated in the negotiation process. This is the so-called "half-life effect" – the theory that any dispute-resolution mechanism tends to lose its effectiveness over time (Kochan).

6. Resort to fact finding tends to become automatic, with the parties viewing it as simply an obstacle to be cleared in order to position themselves for the imposition of sanctions (McKelvey).

7. Fact finding stops the negotiation progress in that from the date of the fact finder's appointment until release of the report, no negotiations usually take place. In short, valuable time is wasted (Simkin).

8. The contents and recommendations of fact-finding reports are predictable and, therefore, have a diminished impact on the parties' negotiations.

9. The recommendations of fact finders tend to be systematically biased towards one of the parties.

Certainly, all of the above observations, both pro and con, have been made with respect to fact finding under Bill 100. This paper will attempt to explore some of these.

2.

The School Boards and Teachers Collective Negotiations Act

The Process of Fact Finding and The Fact Finder's Point of View

The Background to Bill 100

It is important that any reasonable examination of fact finding be placed in proper historical and political perspective. Given the criticisms, from both parties, of Bill 100 and its various elements, one might get the impression that teacher-board conflict and adversarial relations began in 1975 with Bill 100.

In point of fact, collective bargaining by teacher federations in Ontario could be said to have begun in a serious way, just as it did everywhere else in North America, in the mid-1960's. In response to a variety of factors, teachers began demanding that collective agreements cover important non-salary areas such as conditions of work and pupil-teacher ratios. Not surprisingly, trustees balked at such requests, impasses developed and the 1960's' versions of the strike – pink listing and mass resignations – began to occur with increasing frequency. In short, teacher federations went through a metamorphosis from docile, professionally oriented bodies to businesslike, tough-minded and highly resolved collective bargaining bodies in the period 1965 to 1970 and, by the new decade, it was unmistakably clear that serious potential conflict existed and that, on some important issues, the parties were indeed adversaries.

What was missing in this situation was any sort of dispute-resolution legislation or process. With mass resignations and now strikes in Metro Toronto, Windsor, Ottawa and other centres, it was absolutely clear by 1973 that the government of Ontario would have to bring in such legislation without delay.

The first proposal for a special act to deal with teacher-board bargaining disputes proposed compulsory, binding arbitration as the means to finality in the case of impasse. Not surprisingly, the teacher federations reacted strongly against arbitration and, indeed, 10,000 teachers marched on Queen's Park in protest. What was surprising was that, by this time, the trustees' associations were also opposed to arbitration, perceiving that arbitration would greatly diminish their local autonomy.

Out of this emerged *The School Boards and Teachers Collective Bargaining Act*, or Bill 100, a unique piece of legislation with the right to strike and lock out as the final means of impasse resolution, but with these rights in a clearly regulated and modulated form. Perhaps the most notable aspect of Bill 100 at the time was open-scope bargaining. The government had seen the dangers of limiting the scope of negotiations so that now, to the dismay of the trustees, virtually anything either side put on the table was negotiable. For many of the trustees, conditioned as they had been to assume a wide set of management prerogatives, this was to be, understandably, a very difficult adjustment.

Bill 100 carried with it a very heavy dose of compulsory or quasi-compulsory third-party intervention, of which fact finding was a principal part, and was clearly designed not only to "help the parties", but to prevent them from backing into unnecessary strikes, to examine the state of the negotiations and to better position the overseeing body – the Education Relations Commission – to monitor the negotiations. This heavy degree of third-party intervention, and particularly fact finding, could be thought of as a *quid pro quo* for the right to strike and the Ontario government's being mindful of the Talleyrand admonition alluded to earlier: teacher – board collective bargaining – when, at least, it can result in a strike or lockout – is too important to be left *entirely* to the parties themselves. Too much can go wrong; too many other interests stand to be affected detrimentally.

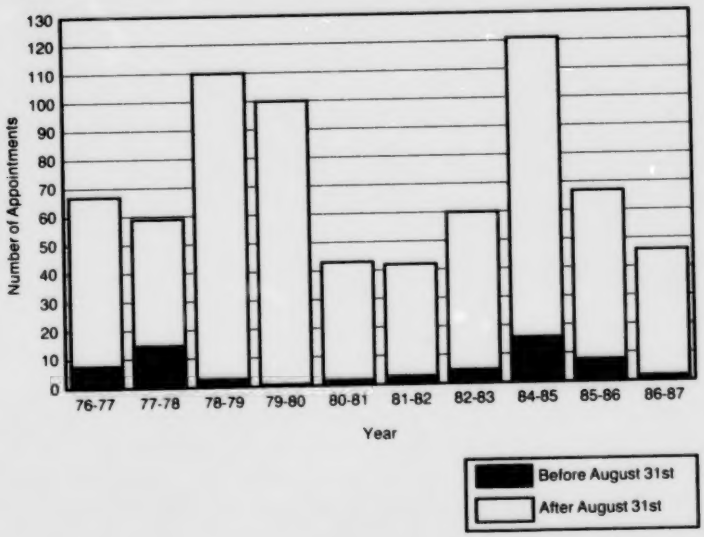
The Bill-100 Process

Bill 100 gives teachers the right to strike and the boards the right to lock out, but only after a significant number of procedures have been exhausted. First of all, all collective agreements expire, by law, on August 31. Notice to bargain must be given by one of the parties by January 31 and actual negotiations begin within thirty days. At some point – theoretically, September 1 – if no agreement is reached, a fact finder is appointed and has 30 days to submit a report to the parties. They have a further 15-day period during which the report is seen by no one but them; if no agreement is attained, the Education Relations Commission makes the report public. While mediation is not mandatory, the E.R.C. will appoint a mediator wherever negotiations seem to be getting into trouble or when so requested by the parties. Finally, before striking, the teachers must call for secret, last-offer-received and strike votes and, even after that, give the Board five days' notice of intent to strike. It is only after the teachers have struck that Boards may lock out. Thus, before sanctions are possible under Bill 100, the parties will have theoretically been negotiating for at least six months, will have undergone fact finding and mediation (at least once), as well as last-offer-received and strike votes.

Policy with respect to fact finding under Bill 100 depends on whether August 31, the statutory termination date of all collective agreements, has passed. Prior to that date, the Education Relations Commission may appoint a fact finder if it deems an impasse to have occurred or if one or both parties makes a request. Subsequent to August 31st, the *Act* requires that a fact finder be appointed "forthwith" if no collective agreement has been attained. In point of fact, however, the term "forth-

with" has been interpreted liberally by the E.R.C., so that, if the parties seem to be making reasonable progress, no fact finder is appointed, notwithstanding that August 31 has come and gone. At some point, however, if no agreement is forthcoming, fact finding becomes a reality. Most importantly, *if one of the parties makes a request for fact finding after August 31, the Commission has little choice but to appoint one*. The actual experience of fact-finding appointments *since* 1975, both before and after the August 31 contract-expiration date, is set out in Figure I, which demonstrates clearly how very few fact-finding appointments have been made prior to September 1st.

Figure I: Fact Finder Appointments



Note: No fact finder appointments were made in 1983-84 because of wage-restraint legislation.

Under Section 23 of the legislation, the fact finder has thirty days, from the date of appointment, to submit his/her report to the Commission. This period may be extended by mutual agreement (in writing) of the parties, and such extensions are not uncommon. Thirty days may seem a long time but, in fact, this period places great time pressure on the parties and extreme pressure on the fact finder. This time pressure, particularly on the fact finder, may have a significant impact on the nature of the process as it actually unfolds.

There are several other dimensions to this time element in fact finding. In negotiating the date of the hearing, all three entities in the process must be cognizant of the requirements on them and try to set a hearing date which will allow each of

them to comply properly. This involves a tradeoff: the hearing must be soon enough that it will allow the fact finder sufficient time afterwards to complete the report (anything less than a week in this respect is usually insufficient); on the other hand, the hearing must not be so soon that the parties have insufficient time to prepare their briefs.

As noted above, there is almost always great time pressure, first on the parties to submit their briefs, and then on the fact finder to file his/her report. Whether this pressure ultimately diminishes the value of fact finding or simply provides a healthy discipline on all of the parties is debatable. In fact, there are two ways to mitigate the time pressure: (1) the fact finder can request, and the parties agree to, an extension to the deadline for the report's submission, or (2) the E.R.C. can give the parties and the fact finder some advance notice of the appointment, so that everyone may begin to do what has to be done before the appointment becomes official.[12]

The Process of Fact Finding

Initial Contact and Logistical Arrangements

Once the fact finder has agreed to take the assignment, his/her involvement begins, and the first contact is made with the parties. Right from the beginning, a variety of approaches is apparent – mainly in terms of the formality and specificity of arrangements made. At a minimum, however, all fact finders obtain agreement of the parties on the date, time and place of the hearing and, under S. 19 of Bill 199, the parties must provide the fact finder with lists of the items outstanding and those not in dispute. A complication which arises from time to time at this stage is that the teacher may want to meet during the day (since the negotiating committee will probably have some form of negotiation leave) but the board at night (since the members have full-time jobs). The fact finder must somehow bring a resolution.

The Briefs

Typically, the first real issue to arise is the brief: what it will contain, when it will arrive and, most troublesome, whether or not it will be provided to the other party in exchange for its brief and, if there is such an exchange, under what circumstances. Some fact finders, having made the minimum arrangements noted above, leave it at that. Others go significantly further and get explicit agreement from the parties that: (1) in addition to the lists of items outstanding, they will provide the current positions, rationale, and any other data or information they deem appropriate; (2) the fact finder will receive the briefs by a certain date; (3) the briefs will be exchanged with the other party at a certain time and place; (4) no further briefs or partial briefs will appear at the hearing; and (5) the parties are satisfied with the procedure (for the entire hearing, joint and private sessions) that the fact finder has outlined on the phone. These arrangements are often then confirmed in writing.

A fact finder's approach to the above question appears to reflect his or her degree of concern with the hearing with respect to how smoothly it goes, how well

12. Up to quite recently, this was seldom, if ever, done.

satisfied the parties are that they had a full and fair opportunity to state their cases, and some assurance that there will be, to use what is now a cliche amongst third parties, "no surprises at the hearing" – in terms, for example, of a last-minute brief which one party has no adequate opportunity to rebut. Such an occurrence (not infrequent) may not be serious in a substantive way, but it might give the other side an opportunity to complain about the process and so make it more difficult for the fact finder to build credibility and respect.

Preparation For the Hearing (by the fact finder)

The next phase – and also one in which there tends to be some variance in approach – is the degree of preparation the fact finder goes through. At one extreme, a few fact finders go through no preparation at all other than a comparison of the two lists of the items outstanding. The rationale here is that it enables him/her to enter the hearing with a completely open mind, unclouded by the preconceptions which inevitably creep in when going through detailed briefs, particularly when they are one-sided. This approach may also reflect what a particular fact finder wants to accomplish at the hearing, mediating rather than fact finding.[13]

At the other end of the spectrum is the fact finder who goes over the briefs in great detail, setting out in writing the positions and the rationale of the parties on each item outstanding, noting other germane facts or data as well as questions s/he intends to put to the parties on a particular issue. With an extreme degree of prior preparation, in fact, the fact-finding report can be "roughed out" even before the hearing, leaving only the recommendations, extra data, rationale, comments on the relationship, and so on, to be written afterwards. This, too, was a relatively unusual model.

In practice, based on the interviews conducted, relatively few fact finders follow one extreme or the other. Most tend towards the middle, with a bias to thorough preparation. However, it should be noted that, as with so many other dimensions of this process, the degree of preparation a particular fact finder will undertake varies as a function of a number of factors, among others: (1) the timing of the hearing; (2) the timing of the briefs' arrival[14]; (3) the number and type of issues outstanding and, (4) the fact finder's experience.

The Hearing (Joint Session)

The hearing will always include a joint session with both parties and usually (but not always) private sessions with each party as well. Typically, the fact finder will begin the joint hearing with some sort of opening statement, setting out his or her view of and approach to fact finding, the procedure and ground rules, and making

13. The relatively unusual model works as follows. Coming in without the benefit of briefs, the fact finder requires the parties to carefully explain everything at the hearing, the resultant discussion being a springboard, in a sense, for a form of negotiation and mediation.
14. For example, one or both briefs might not be received until the night before the hearing; they might be waiting at the hotel desk when the fact finder checks in. Given the hour, the state of tiredness, etc., this leaves little time for preparation.

certain that the parties are in agreement and that there are no unforeseen difficulties or complications. It is clear from the interviews that fact finders use this statement to (1) set the tone for the hearing and process, (2) begin to establish authority and credibility, and (3) ensure a surprise-free hearing, making certain that no last-minute complications are about to be sprung.

The degree of formality in the hearing is an interesting dimension in this process. Again, there is some variance in the degree of formality used by fact finders, but a rough "mean" appears to exist with a profile more or less as follows. The joint-hearing process is flexible and informal in terms of relatively free-flowing debate on the issues; that is, there is seldom any limitation on reply evidence or argument as there is in rights arbitration. On the other hand, the process is sufficiently structured to ensure that (1) all the issues are covered, (2) *both* sides feel they have had a full and fair opportunity to state their cases, (3) *both* sides feel the fact finder has, in a sense, "tested" the other side's position and rationale. In short, there must be sufficient formality to ensure an orderly and disciplined hearing which is useful to the fact finder as a learning process and is perceived by the parties to be fair and full and open. The parties themselves showed a high degree of agreement on this question on the degree of formality and responded as follows to the question, "In general, how formal would you prefer the hearing to be?"

Highly formal	1.9%
Somewhat formal	71.8%
Informal	18.8%
Highly informal	7.8%

Most fact finders interviewed use an issue-by-issue approach as an agenda for the joint session. Proceeding in whatever order seems most appropriate under the circumstances, they would ask the party proposing the change to the agreement to speak to that change, then the other party to respond, and allowing further discussion, as needed and desired. Presenting their proposals and rationale to a fact finder in the presence of the other party imposes a certain natural discipline on each party since they are completely open to rebuttal. In effect, a form of cross examination by either the fact finder, the other party, or both, is built into the hearing process.[15] The hearing would go on until all outstanding issues had been covered.

With the imposition of the *Inflation Restraint Act* (Bill 111) in 1983, another subject became mandatory and, thus, a new phase of the joint session – and, indeed, of the entire process – was born. The follow-up to Bill 179 (1982) and Bill 111 required fact finders (and arbitrators) to set out the cost of their recommendations and to comment, as well, on the employer's ability to pay. Educational finance being an immensely complex subject, this was a major challenge to fact finders: here was

15. In most situations, the order would be that in which the outstanding items appeared in the collective agreement. However, in certain situations where, for example, there was one key issue on which the resolution of all others were dependent, that issue might be dealt with first.

a new and very difficult arena in which they had to become educated quickly.[16] The first few fact finders to take assignments under the new requirements of Bill 111 tried to deal with this requirement by holding what amounted to a second joint session, this one on costs and ability to pay.

While (again) there was variation on this theme, a typical approach was to have the Board's Superintendent of Finance present to the fact finder (probably using overheads or flip-charts), with both parties present, the cost of each party's proposal (separately and in aggregate) and the ultimate impact of those proposals on the local educational mill rate. As with that part of the joint hearing dealing with the issues outstanding, this format built in the potential for rebuttal and cross-examination (both by the teachers and by the fact finder) and, thus, imposed a certain discipline on the Board to present the financial picture accurately.

The results of this development were interesting. First, it should be admitted that most, if not all fact finders (and, no doubt, interest arbitrators as well) approached this dimension of their task with considerable trepidation. Educational finance is enormously complex and, in the public sector, the question of ability to pay really boils down to the question of the political will to take responsibility for agreeing to compensation increases and, possibly, the imposition of tax increases. Hence, this was perceived as a very difficult task for third parties.

On the other hand, a number of fact finders believe that it was a very useful exercise to go through. It gave them, as fact finders, a much better "feel" for the real balance of issues confronting the parties, at least in financial terms. Importantly, too, it gave both parties – and particularly the teachers – a better appreciation of the financial impact of the teachers' request[17] and, thus, allowed them to make more intelligent and appropriate trade-offs. In a sense, this exercise might be thought of as an example of the collective bargaining ideal of complete sharing of information.

To what extent these requirements under Bill 111 actually influenced recommendations is difficult to measure and, since there was a cap of 5.0% on compensation recommendations, probably impossible. It seems reasonable to infer, however (and the fact finders interviewed agreed), that the requirement to actually include the costs of the recommendations being made, as well as a section on the board's ability to pay – that is, the trustees' willingness to take responsibility for higher education costs and, possibly increased taxes – at least made fact finders more sensitive to the trade-off implications of what they were recommending.

Interestingly, with the expiry of the Bill 111 coverage period, many fact finders stopped including sections on the cost of recommendations and ability to pay sections in their reports. Many boards stopped presenting fact finders with cost and taxation data, as well.

16. It is clear that, although the E.R.C. had always included sections on educational finance in their fact-finder training workshops, few, if any fact finders ever made any mention of the cost of proposals in their reports prior to the requirements of Bill 111. According to the fact finders interviewed, this was in response to the parties, neither of which ever presented much in the way of financial/cost/taxation data). On the other hand, according to the parties (or at least the boards), this reflected fact finders' inability or unwillingness to deal with financial data.
17. There was one instance of a fact finder, having gone through the joint-costing-and-ability- to-pay presentation, sensing that there was a chance for a mediated deal at that moment. With permission of both parties, the fact finder mediated and, fourteen hours later, the parties had an agreement.

The Private Sessions

While a few fact finders appear not to make use of these, almost all do.[18] In the early days of Bill 100, it is probable that a large number did not meet privately; that has changed substantially and it is now rare for private meetings not to take place. (The parties appear to want fact finders to hold them, judging by the questionnaire responses.) Purposes served vary but, by definition, the private sessions afford the fact finder and each party the opportunity to discuss aspects of the situation without the other party being present. Hence, it is clear that this element of the process fits very squarely into the mediation or "accommodative" model of the process: the fact finder/mediator is trying to probe for priorities, needs, perceptions of problems, etc.

Procedure in these private sessions tends to be very informal and, typically, takes the form of a round-table discussion. The fact finder, depending on the situation, may be probing for any or all of the following:

1. that party's true priorities;
2. that party's perception of the other party's true priorities;
3. intraorganizational or other problems on that team;
4. that party's views of the intraorganizational and political problems faced by the other team;
5. further explanation of specific items, particularly technical or complex ones;
6. possible devices for the resolution of problem issues;
7. possible reaction to recommendations the fact finder may already be considering making in respect to certain of the outstanding issues;
8. some better understanding for the relationship between the parties.

Most of the above – for example, the probing for each side's priorities – are self explanatory; others warrant some amplification. Anyone familiar with the negotiation process knows that bargaining groups and, indeed, bargaining teams, are not monolithic in their interests, either with respect to the goals they wish to achieve in bargaining or the means they would use to achieve them. S/he also knows, however, that, in the presence of the other party, both parties are going to exercise a considerable degree of team discipline and reveal little in the way of intelligence in this regard. Hence, it is really only in the private sessions, with their informal and nonstructured approach and off-the-record nature, that one can begin to get some understanding for this dimension of the problem. Ideally, the fact finder will try to get all members talking in order to start revealing aspects of this dimension.

With respect to the same problem, third parties know that the best source of information of the internal power structure and political and intraorganizational realities faced by one team is the other team.

18. The normal sequence in these private sessions take place after the joint session. However, fact-finding interviews and the parties' questionnaires revealed that, the very odd time, they have taken place *before* the joint session.

Fact finders also use these meetings to begin to search out possible solutions to certain items outstanding. It may well be that one member of the team has an idea, but that it has never been put to the other side as a way of resolving a particular difficulty.

As well, the fact finder may "test out" possible recommendations s/he might make on certain issues. Reactions in the private session to possible recommendations might be somewhat theatrical but, on the other hand, might give an early signal to the fact finder about potential acceptability of that particular way of thinking. This "testing" was mentioned, in various forms, by a number of fact finders and, in some cases, seems to come close to mediator's "supposal". Almost all those interviewed used this tactic in one form or another during the private sessions.

The private sessions also afford the fact finder a means of beginning to condition the parties to what the report is likely to contain. Some of those interviewed considered it important that the parties not be surprised by what they read in the report.

Some fact finders mentioned that, in some private sessions, "a sort of catharsis" often takes place, in which the team, and individual members of the team, are able to "blow off steam." The very fact that an outsider is sitting there, interested in hearing what they have to say, seems to have a positive effect – at least as far as the parties' perception of the process is concerned. Another fact finder described this as "the day-in-court syndrome": a party – interestingly, usually teachers – using the private session to "get their side of the story onto the record" and seek vindication (from the fact finder's reaction).[19]

As noted above, these "back-room" sessions are regarded by fact finders as an opportunity to pick up further signals about the relationship between the parties. This process, of course, starts with the briefing at the time of the appointment by the E.R.C. Field Services Officer, is reflected in the tone and content of the briefs, and becomes even clearer during the joint session. However, the private session is the first forum in which each party may say exactly what it thinks about the other, and in no uncertain terms. Often, there is a thick layer of rhetoric for the fact finder's benefit, as well as the odd "personal ax" being ground. When the level of bitterness is consistently expressed by all participants, however, and when it is experienced in *both* back rooms with equal depth, some conclusions can reasonably be drawn with respect to the state of the relationship. More importantly, with feelings this clearly expressed, a fact finder can begin to sense the reasons for it. Those reasons are often bound up with the negotiations; they explain one or both parties' position or why the negotiations have not gone anywhere.

One interesting phenomenon which occurs in these meetings from time to time is the fact finder being told about certain occurrences, as evidence of the other party's lack of honesty or good faith; the interest lies in the fact that the fact finder will hear of the very same incident in *both* back rooms, but from two points of view exactly 180 degrees apart. Sometimes, upon hearing the very same set of facts

19. The degree to which this happens, however, seems to be very much a function of the degree of faith in the process of the parties in question: if they have any faith in fact finding, it can occur; if not, the attitude will be, "Let's get this over with quickly. We've got things to do."

relayed from two diametrically opposed points of view, with precisely opposite inferences drawn, one can see that it reflects a misunderstanding or, more likely, the parties' tendency to stereotype each other and assume the worst of the other's action.

An incident in a fact finding done by the author illustrates this phenomenon well. While, as usual, there were a great many items outstanding, the issue which provoked the greatest outrage – from both parties – was relatively trivial: a "special leave" day agreed to by the Board in the previous round of bargaining. The Board now wanted to remove it from the collective agreement, citing unconscionable misuse of the day by the teachers. The Board's rationale, expressed with genuine anger, was as follows (paraphrased by the author):

> This special leave was requested last bargaining round and justified on the basis that there were situations – unexpected emergencies of a personal nature, for example – where teachers simply did not want to tell their principal. There were almost tears in the eyes of the teacher negotiator as she drew us mental pictures of flooded basements or children in jail.
>
> So we gave it to them, and what do they do? They use the special leave day for the taking of long weekends! They even plan this weeks ahead of time! You can't tell me that's an emergency! That behaviour is typical of the teachers in negotiation: give them an inch for a good reason and they'll take a mile.

The teachers' view, not surprisingly, was very different. In negotiations, they had indeed justified the day on grounds noted above. However, as it turned out, the negotiations had gone down to the wire and, with a mediator present, the only item separating the parties was the special-leave day. The mediator, nearing his self-imposed deadline, simply wrote out a special-leave clause as a mediator's proposal and the parties accepted it. That wording, which went into the agreement, neither stipulated nor even suggested anything about emergency usage and, in deference to the Board's need for planning, suggested that the teachers give advance notice of taking such leave wherever possible.

In other words, the teachers were using the special-leave day in accordance with how it finally appeared in the agreement, a reflection of the mediator's wording and not the teachers' original justification of the request in negotiations. The teachers themselves were angry that the Board now wanted to remove the leave day from the agreement:

> Nothing this Board has done in years has generated as much teacher goodwill as this leave day. And now what do they do? They want to take it away!

It was easy for an outsider to see how easily the two sides could perceive this issue in diametrically opposed ways and why, when viewed in those terms, it would generate a high level of anger. The real culprit was neither the Board nor the teachers; it was the process which, under the pressure of a deadline, produced a clause significantly different from that which the parties had discussed for so long. In the

minds of the Board was the discussion; in the minds of the rank-and-file teachers was the wording of the agreement they had in their hands.

The fact finder hoped that an outsider's explanation of the genesis of this situation might help dissipate some of the anger on both sides and open the way for an agreement. In this case, an agreement was attained before the report went public.

Thus, it is possible for the fact finder to use such incidents in the report to remove an obstacle to settlement and, possibly, as one small means of trying to help the parties improve their relationship.

Finally, the private sessions serve a vital purpose which the written briefs and joint sessions cannot fulfill: they allow the parties to be frank. The written briefs and joint sessions are essentially steps in negotiation (since the bargaining opponent is always "present") and, therefore, contain the requisite levels of rhetoric, exaggeration and obfuscation which negotiation strategy requires in the presence of one's opponent. Unfortunately, what works against a bargaining opponent can also work against – or at least make the job more difficult – for a fact finder. The private sessions, then, are the one opportunity the fact finder has to get in *behind the negotiations rhetoric* with the parties themselves. It also is the one opportunity s/he has to begin to understand the human dimension of what is, by any standard, an intensely human process.

After-the-Hearing Contact

Few fact finders have any contact with the parties after the close of the hearing; however, a small number do. Such contact could serve several purposes. First, many of the issues placed before a fact finder are extremely complex, and have implications which may not be apparent to anyone not intimately familiar with all aspects of the collective agreement and, indeed, the entire school board system, whether in the agreement or not. Often, then, while working through the issues after the hearing, new questions arise and it is necessary to call someone to learn the answers. This may be the chief negotiator, or it may be someone else on the team who is in a good position to know the answer (for example, the Superintendent of Finance or the teacher team's costing specialist).

Rarer still, a few fact finders, beyond simply putting questions of fact and interpretation to one or both of the parties over the phone after the hearing, might go so far as to try out – very circumspectly – some "supposals." This would be done only where there existed in one or both groups an individual with whom the fact finder had managed to develop some trust and rapport and, obviously, it would be done on a completely off-the-record basis. The fact finder who does this is taking something of a risk but of the interviewees who used it, all reported that it could work well under the proper circumstances. None reported that it had backfired in any obvious way.

The Strategy of Fact Finding

To a considerable extent, the strategy employed by any fact finder is a function of the goals s/he is trying to achieve in a given situation. Since, in almost every

situation, there is more than one goal being pursued, there may be a blend of strategies, but with a complementarity to them. Accordingly, this section is organized in terms of the different purposes served.

Role 1: Reporting to the Public

In almost every case, fact finders interviewed were highly sensitized to this role. The goal in this respect was a very simple and obvious one: to write a report that the public would understand. However, since in almost no situations would members of the public actually read the fact-finding report directly, this goal has to be accomplished through the news media. The *real* goal, then, was to write a report which (1) the news media could understand and (2) which would interest the media.

Given some of the other major problems associated with fact finding under Bill 100, it may be impossible, in most situations, to interest the news media in the report; in a sense, that is a function of the situation and is beyond the control of the fact finder. That said, however, a report that is well written, spells things out in an understandable fashion and *is as short as possible*, seems to be helpful towards that goal. To further that end, in 1980 the E.R.C. introduced the policy of having fact finders draft two-page press releases which summarize their reports, as an aid to those reporting on them. To what extent this has helped is not clear. They also encourage fact finders to keep their reports as short as is consistent with adequate rationale.

Role 2: Helping the Negotiation Process

In the theory and tradition of fact finding, Role 1 – informing the public – and Role 2 – helping the negotiations move forward – are complementary. That is, the threat of public exposure of an unreasonable position or an intransigent attitude was thought to be a source of pressure on one or both parties; hence, the public release of the report was envisaged as a pressure point in the process. In short, the theory of fact finding has always featured an element of embarrassment to one or possibly both of the parties.

In practice under Bill 100, however, this anticipated strategic element seems not to have materialized to nearly the extent envisaged by the drafters in 1975, and, in most situations, fact finders and the E.R.C. appeared not to view it as a major potential strategy. The reason for this will be explored in Chapter 6 when the impact of timing on the effectiveness of fact finding is discussed.

The other element in the theoretical arsenal of fact finding – recommendations – is another matter, however. In the first few years of Bill 100, when all concerned were groping to understand the new process and the E.R.C. was faced with the daunting task of trying to recruit a massive number of people to act as fact finders, there was no particular philosophy or vision of fact finding. People were recruited to act as fact finders wherever they could be found, sent out to the field, and allowed (expected) to interpret their role more or less as they deemed appropriate based on their interpretation of Sections 20 and 21[20] of Bill 100. As a result, there

20. See page 51 for Sections 20 and 21.

was a wide variety of approaches, including a significant number of reports with few or no recommendations or, at best, very general recommendations.

By the period 1979–1982, however, the E.R.C. had begun to articulate a clear vision of fact finding, a vision which had as its core, a complete set of clear recommendations, well supported by data-based rationale, and set in a candid, hard-hitting report. The Commission also tried to recruit and develop fact finders who could do this. As a measure of the perceived importance of decisive, well-supported recommendations, Professor Bryan Downie, who served as E.R.C. chairman from 1979 to 1987, said,

> . . . the real limitation of fact finding became finding the right people to do the job – people who were able to see through the confusion of negotiation, to perceive the deal, and who were then willing to write a tough report recommending that deal.

Thus, fact finding under Bill 100 became very much centred on recommendations and, in a sense, the ideal strategy (all other things being equal) was to make a complete set of recommendations on the important or hard-core items outstanding.

That said, however, it must be recognized that realistic goals and strategy are very much a function of the number and nature of the items outstanding as well as a number of other factors unique to each set of negotiations. In this light, the discussion of strategy becomes an examination of the considerations faced by the fact finder in making recommendations.

Consideration 1 – Number of Items Outstanding

On the positive side, if there are a very large number of demands still on the table – and, regrettably, this tends often to be the case – it is probable that the negotiations are in Phase I[21] or the early stages of Phase II. There remain on the table many items which are not serious; they are there for strategic and tactical reason, as trading horses, or because they were suggested by constituents and have not yet been dropped. It may be here that the fact finder can help with intra-organizational dynamics by recommending that many of these non-essentials be dropped. There seems little doubt that the teacher negotiators knew all along that such demands would be dropped, but a recommendation from the fact finder takes some of the responsibility off their shoulders – an important consideration, given the political dynamics of any association or union. Precisely the same political dynamic applies to the trustees as well. Clearly, all of the fact finders interviewed almost always

21. A number of authors have observed that negotiations pass through three distinct phases or stages. **Phase I:** This, typically, is the longest phase. Paradoxically, however, nothing is accomplished in terms of movement along the bargaining range. Rather, the parties use this period for assessment – of the bargaining environment, of the range and, particularly, of their opponent's intentions and aspirations, the so-called "bottom line". At the same time, each party tries to hide from the other party its own true aspirations. A certain amount of ritual, ceremony and rhetoric (for the purpose of satisfying one's own constituents) also takes place in this phase. **Phase II:** This is the second-longest phase, during which the parties start narrowing the range between their respective opening positions by settling some issues, by modifying their positions on others, and by dropping some demands completely. In this way, each party moves – very carefully – towards what each hopes will be the ultimate settlement range. At the same time, the assessment process continues. **Phase III:** This is the shortest of the three phases. It is here that something – an external pressure point or an action of one or both of the parties – precipitates movement to finality. This stage has often been referred to as the climax or the crisis in the negotiations process.

ended up recommending that the parties simply drop a large number of demands. Given the nature of bargaining, along with pluralistic, democratic and political nature of unions, the bulk of these tend to be teachers' demands.

If the fact finder and the parties can "clear the decks" of many of the non-essentials, then it is possible the parties can begin to see the outlines of a settlement. This sort of situation poses a dilemma for a fact finder, however; there is a temptation to "go for a settlement", making specific recommendations on all the major items outstanding. But there is a risk. Given that the negotiations may still be in Phase I or very early-Phase II, it is possible that more time will be required (however appropriate the recommendations are) and, the longer the period required, the more probable the fact finders's major recommendations will be overtaken by events and rendered obsolete.

One of the major realities faced by fact finders in the Ontario teaching sector is the tendency for the parties to monitor other teacher-board settlements in the province extremely carefully. There is no question that there is a significant "pattern-bargaining" dynamic present and that both parties therefore are often reluctant to settle too early for fear of being shown by later events to have been too high or too low. In addition, certain major settlements are perceived to be trend-setters, to be matched or beaten. Hence, the passage of even a few weeks, if they bring a high-profile settlement or new inflation data, can render a fact finder's salary recommendation completely unacceptable to one party, while forming the minimum (or maximum) acceptable to the other party. Hence, a recommendation overtaken by events can become worse than irrelevant; it can become an actual impediment to settlement. In short, the "shelf life" of a fact finder's recommendation on salary can be very short, depending on the time of year and what is happening in other sets of teacher-board negotiations. The short shelf life of recommendations is particularly troublesome if the report is coming out immediately prior to a "dead period" in which negotiations are not likely to take place, such as the Christmas holidays and, most particularly of all, the summer months.

Hence, a fact finder who finds him/herself making recommendations in December or June, must make a judgement as to how likely it is that the parties can reach an agreement before the end of the school term. If the probability is reasonably high (and s/he senses the parties really would like to settle before the holiday), then specific recommendations may be appropriate. If there is little chance for settlement prior to the holiday, however, then a different form of salary recommendation may make more sense. One possibility here is a contingent recommendation: as one example, that the parties agree to a grid increase equal to the median increase reported by the E.R.C. as of October 1. There are examples on file of fact finders handling this dilemma well and not so well.

With a large number of issues outstanding, there is one other major difficulty facing the fact finder: namely, the sheer volume of issues to sort through. It is more difficult even to conceptualize the bargaining range and, hence, the possible settlement zone, with over one hundred demands and proposals still on the table. A fact finder is a stranger, parachuted into a highly complex situation in an attempt to analyze it, report on it and suggest a solution to it. All of a fact finder's resources

(time, energy, intellect and understanding) are put under a greater strain, the larger the number of issues outstanding. It is much easier to make a serious mistake – to overlook or give short shrift to an item important to one party, to make a calculation error, to misunderstand the implications of a proposal. It is also more difficult to carry out much serious analysis of the positions or the situation. In short, with a very large number of issues, the quality of a fact-finding report and its recommendations may diminish.

Consideration 2 – Basis of Recommendations

An issue which lies at the heart of the question of the true nature of fact finding is the principles which guide the fact finder in formulating recommendations. While it is seldom, if ever, a clear-cut, black-or-white proposition, there are two possibilities which, in the extreme, are: (1) what the fact finder personally believes is "right" under the circumstances (regardless, possibly, of what the parties think) or (2) what the fact finder believes the parties will ultimately accept (regardless, possibly, of what s/he believes is "right"). As noted in Chapter 1, this first approach is called the equity or adjudicative model, while the second is referred to as the accommodative or acceptability model. In a sense, the equity approach could be thought of as a variation on the arbitration theme, while the accommodative is much more reflective of a mediative approach.

Some would argue that, in terms of results, there should be no difference between the accommodative and equity approaches. That notion would be correct but for the following realities which, in varying degrees and blends, apply in most bargaining and fact-finding situations:

1. The parties' situations do not perfectly mirror the outside world;

2. the parties do not see their situation in exactly the same light as the fact finder;

3. the process of collective bargaining is not entirely "rational" and involves politics, egos, symbolism, and other non-quantifiable variables;

4. the outcome of bargaining is partially a function of bargaining power.

Unfortunately, most, if not all, of these conditions usually prevail and the last one – the influence of bargaining power – is always present. That is to say, *every* bargaining outcome is, potentially, to some extent, a function of bargaining power. It is inevitable, therefore, that there will always be some issues in which the fact finder sees one appropriate solution but the parties another.[22] It is therefore even more certain that, with respect to a complete package of recommendations, the fact finder and the parties will not always be in complete agreement. In short, equity (at least, as the fact finder perceives it) is seldom equivalent to accommodation, if for no other reason than the accommodative approach factors-in the parties' relative bargaining power and the equity approach does not.

22. It should be noted that this does not suggest the parties see a solution at the time at which the fact finder is operating; if they did, there would be no dispute. This refers, rather, to what they will ultimately accept, given the pressure of a deadline or threat and the realities of bargaining power.

The question arises, then, which approach is more appropriate, in a strategic sense, for fact finding? The answer, under Bill 100, is that *both* models play a major role, in both a practical and a theoretical sense.

First, there is, clearly, a preference for the accommodative approach reflected in the opinion of many experienced fact finders and in much of the research literature. Judge Alan Gold, in a 1973 speech of the Society of Professionals in Dispute Resolution, said:

> I tend to plump for the 'acceptability' school. Perhaps I am a cynic, but for me anything that is acceptable to parties is *prima facie* equitable; even if sometimes the acceptable solution is a bitter pill [for the fact finder] to swallow.

In a sense, this view of fact finding contradicts the popular perception that fact finding is a process which reviews the items outstanding, rationally tests the positions against relevant and objective criteria, and comes up with "fair" and appropriate recommendations for settlement. This letter vision of the process – which is held by much of the public, many of the parties and a few fact finders – may be based on a number of factors. The term "fact finding" itself seems to suggest the adjudicative/reporting model and many of the parties at least profess to expect "...the finding of facts, not the making of recommendations!"[23]

Section 20 and 21 of The *Teachers and School Boards Collective Negotiations Act* deal with the duty of the fact finder, contents of the report and criteria used.

> **20.** –(1) It is the duty of a fact finder to confer with the parties and to inquire into, ascertain and make a report setting out the matters agreed upon by the parties for inclusion in an agreement and the matters remaining in dispute between the parties.
>
> (2) A fact finder may, in his report, include his findings in respect of any matter that he considers relevant to the making of an agreement between the parties and recommend terms of settlement of the matters remaining in dispute between the parties. 1975, c.72, s.21.
>
> **21.** In inquiring into and ascertaining the matters remaining in dispute between the parties, the fact finder may inquire into and consider any matter that the fact finder considers relevant to the making of an agreement between the parties including, without limiting the foregoing,
>
> (a) the conditions of employment in occupations outside the public teaching sector;
> (b) the effect of geographic or other local factors on the terms and conditions of employment;
> (c) the cost to the board of the proposal of either party;
> (d) the interests and welfare of the public. 1975, c.72, s.22

The *Act* itself seems to suggest or imply the adjudicative model by virtue of stating that *it is the duty*[24] of the fact finder, on one hand, to set out "the matters

23. Comment made by a board on its questionnaire. Similar comments were made by teachers in approximately equal numbers.
24. Emphasis added.

agreed upon by the parties for inclusion in an agreement and the matters remaining in dispute between the parties" but, on the other hand, that the fact finder "*may*[24] make recommendations for terms of settlement of the matters remaining in dispute. . . ." S.21 sets out four criteria the fact finder may consider, presumably in making recommendations.

As well, a good part of the process seems predicated on the notion that fact finding will produce an adjudicative, scientifically based outcome. Consider the following elements:

- The fact finder's instructions from the E.R.C. and experience that his/her recommendations, in order to have any persuasiveness or credibility, will have to be supported by well-thought-out rationale;
- the parties emphasis on data and comparisons in both pre-hearing briefs and in argument at the hearing;
- the fact finder's need for such data and support.

How, then, does all of this, with its emphasis on rationale, data, and comparisons – in short, a scientific approach to finding *the* "answers" – square with the accommodative approach? Professor Robert Doherty, of Cornell University, proffered this explanation in 1975 speech to the Education Relations Commission:

> Because it is so difficult to quantify the relative merits (comparability, the market ability to pay, the public interest, etc.), the factfinder will frequently use the parties' arguments only to justify what he has wanted to achieve all along – *acceptability*. . . . This means an acceptance based not so much on the grounds that the factfinder's recommendations were models of logical persuasion, but because he or she was smart enough to give the lion the lion's share and give to the mouse what mice deserve. In other words, there is a tendency for factfinders to make their recommendations conform to relative power positions and to build the report around those concessions or gains the parties see as essential. For example, if A wants a proposal by a factor the factfinder assesses to be, say, 10, and B opposes that proposal by a factor of 5, and if A is stronger than B, the factfinder will probably hold for 1, regardless of the merits of the arguments, the relevance of the facts, even what is deemed to be fair.[25]

This explanation seems intuitively appropriate for the simple reason that, since one clear measure of success for a fact finder is to have his/her recommendations accepted by the parties, then s/he will try very hard to fashion a set which *can* or ultimately *will be* accepted. This means, in essence, paying more attention to the relative power positions and priorities of the parties than to the answers scientifically derived by the fact finder him/herself.

It is important, moreover, to take the above reasoning and apply it to the Bill 100 context. Doherty was speaking on the basis of the American experience with fact finding, where public-sector unions have the right to strike less frequently than in Canada and sometimes do not even have the option of binding arbitration. We

24. Emphasis added.
25. R. Doherty, *A Blind Man among the Eagles*, E.R.C., 1975.

know, too, from several pieces of research, and from common sense, that what *follows* fact finding in the process will determine to a significant degree the probability of the parties' accepting the recommendations. For example, where final-offer arbitration follows fact finding (with the arbitrator choosing *in toto* the final offer of one party or the fact finder's recommendations), the parties accept the fact finder's recommendations in a very large proportion of the cases (72.3%).[26] Common sense suggests that, under a statute which not only gives the parties the right to ignore the recommendations but gives the teachers the ultimate right to strike and the board to lock out, a fact finder would be even more likely to take the accommodative approach.

This said, however, it would be wrong to discount the influence of the equity principle in the formulation of fact-finder recommendations: in theory and in practice, it is very significant. In a theoretical sense, an equity-based set of recommendations can be likened to the key element of so-called "principled negotiations," a deal based on objective criteria rather than on the final "position" of one of the parties. As Ury and Fisher point out in their widely acclaimed book, *Getting to Yes*,[27] a negotiator who agrees to a settlement based on such objective criteria does not "give in" to the other side; s/he gives in to the answer dictated by the criteria, even if that answer is not in his/her favour. Under Bill 100, that answer may be "dictated" by the fact finder, using objective criteria. Providing a negotiator with a means of conceding *without giving in to the other side* is an important element in any dispute-resolution procedure and constitutes a major strategic dimension to fact-finding, particularly as it occurs under Bill 100.

Quite apart from helping one or both of the parties compromise, the equity element underlying fact-finder recommendations tempers the influence of raw bargaining power on the process. In the private sector, where bargaining power is the ultimate arbiter of bargaining outcomes, a long strike or lockout is not likely to harm anyone but the principals in the dispute. Accordingly, the law allows a strong party to insist on its position, theoretically *ad infinitum* – not because that position is necessarily "right" or "just", but because that party has the power to insist and the willingness to take the consequences of insisting – namely, a long strike or lockout.

It is clear that the drafters of Bill 100 never intended that the power-driven private-sector model be used in Ontario teacher-board bargaining in unmodified form. In the education sector, where strikes hurt non-participants, the unrestrained use of bargaining power in pursuit of "inequitable" objectives is simply less acceptable. The outcomes of teacher-school board negotiations cannot be determined (in the words of one chief negotiator) solely "on the balance of terror".

Accordingly, directed by Section 21 of Bill 100 and strongly encouraged by the E.R.C., the fact finder examines such relevant data as salary trends, settlement patterns, and C.P.I. movements and develops criteria for an answer s/he believes is just and reasonable under the circumstances – in other words, the equity approach.

26 Gallagher and Veghlan, *op. cit.*

27. Ury & Fisher, *Getting to Yes* (Houghton Mifflin Co., 1981).

A party which insists on a position significantly beyond that, sustained only by superior bargaining power, cannot continue to do so without running the risk of exposure and criticism through fact finding and consequent public censure.

All of this having been said, however, it must also be recognized that in one significant dimension, the equity and the accommodative are the same. By way of example, if a group of teachers were poorly paid relative to other teachers (an equity argument), then that would increase their bargaining power (an accommodative element). It would do this because the teachers' salary arguments in negotiations would have an innate credibility and "rightness" about them which they would otherwise lack. As well, the teachers' table team would have their membership more solidly behind them and could more credibly threaten a strike. In this case, then, an equity element enhances one side's bargaining power and, in so doing, begets an accommodative element. With its emphasis on recommendations supported by data and comparisons, the fact-finding process draws together the equitable and the accommodative: the fact finder's recommendations themselves give one side more bargaining power.

In both a practical and a theoretical sense, then, fact-finding recommendations are really a blend of both the accommodative and equity approaches. Fact finders are cognizant of factors such as bargaining power, political realities, and the priorities of the parties and try, to the extent possible, to find "the deal"; that is, they try to be accommodative. However, the accommodative approach is significantly modified by equity-based thinking. This is important because it influences the character of teacher-board negotiations in that it partially transforms what is normally a power-driven process into a somewhat more "rational" process; the influence of bargaining power is attenuated, while the influence of objective criteria is enhanced. This effect was alluded to by Professor Downie:

> One of the things everyone – teachers and trustees – admires about the Bill-100 system is the use of data. It's rare for negotiation to be based to such a degree on data, and rarer still for the negotiating parties to both use the data provided by a government agency. Fact finding is the raison d'etre for this use of data by the parties. We should all understand that if you eliminate fact finding, the system of negotiating in Ontario education will be profoundly changed.[28]

The mixture of the accommodative and equitable, in any given situation, is a function of all factors which define the circumstances, as well as the fact finder's own approach. This area was explored in the interviews with fact finders and, not surprisingly, a variety of opinion emerged, with the fact finders spread over a fairly wide spectrum. Several general conclusions can be drawn, however. First, while opinion does tend to be spread on this question and while every situation calls for a different blend, the fact finders interviewed generally evinced a preference somewhat towards the accommodative end of the spectrum. Second, fact finders tend to think rather more adjudicatively at the level of the individual issue and rather more accommodatively at the level of the entire package of recommendations, where they

28. Interview conducted by the author, 1987.

attempt to blend the priorities of both parties. Third, there is a severe shortage of time in which to carry out a fact finding, and this has implications for the equity/accommodation balance.

Even those most strongly wedded to the accommodative model made the point in interviews that, under Bill 100, there is insufficient time and opportunity to apply it properly. Without exception, all agreed with Professor Doherty's diagnosis of the essential weakness in fact finding as he had experienced it: " . . . There is too much to learn in too short a time . . . to make the choices that parties will accept as reasonable."[29]

Consideration 3 – Lack of Time

This has already been alluded to but, given its importance to fact finders, it deserves a section of its own. There are two dimensions to the time constraint: (1) the fact that the *Act* required that the report be submitted within 30 days and (2) the fact that E.R.C. policy normally allows four billable days for a fact finding. Hence, with four days of work, the following must be accomplished and it must all be timed so that the report is ready at the end of day 29.

- contact with the parties and the making of arrangements for hearing date, time, place, etc., as well as for production, delivery, and exchange of briefs between the parties.
- reading the briefs and preparing for the hearing (many briefs are several inches thick).
- travelling to and then running the hearing, which consists of a joint session, private sessions with each of the parties and, possibly, a session on the costs. (The hearing itself usually would take one very long day; travelling could take anything between two hours and one full day).
- setting out the issues in dispute for the report (factually only).
- gathering data to supplement, verify and balance those data provided by the parties, and researching the issues.
- analyzing the situation, deciding upon, articulating and justifying the recommendations.
- final editing.
- printing and duplicating.

Keeping in mind that, in many fact findings, one is faced with a very large number of issues and a final report of anything from twenty to sixty pages, it is not difficult to see why time is such a major constraint in the process. Knowing that the report is going to be read by critical audiences and will probably "go public" creates even more pressure on the fact finder. In fact, many fact finders interviewed indicated that, with all but the simplest assignments, they take considerably longer than four days. In fairness, it should be made clear that the E.R.C. allows extra days when requested by fact finders; nevertheless, it is probably fair to say that few good-

29. R. Doherty, *op. cit.*

quality fact-finding reports have been produced in anything close to the time actually billed.

The practical reality flowing from this is that the job is not done nearly as well as it could be in many cases. Those fact finders fortunate enough to be based in professions which do not depend upon "billable hours" might take the required time or they might not; others simply cannot afford to. Hence, for example, while many fact finders would like to probe further for "the deal", they cannot. There is also a much greater possibility of making a mistake and a greater need to concentrate on the key issues, leaving insufficient time for the other items.

As a result, the approach under Bill 100 tends often to be more normative than accommodative and more normative than many fact finders would like it to be. Many fact finders start normatively (i.e. making up their own minds on the issues), and to the extent possible under the time constraints, try to make the end result as accommodative as possible by meshing the two sets of priorities. Unfortunately, given the stringency of those time constraints, the accommodative dimension is usually quite limited. There was clearly an almost rueful suggestion of "making do" in the fact finders' discussions of this issue:

> " . . . I'd like to probe more for 'the deal', but there's no time"
>
> " . . . In one day, it's impossible to find out what the parties will accept. Consequently, as a practical matter, I'm closer to the equity than to the acceptability end of the spectrum, although I'd like it to be the other way round."

Role 3: Changing the Direction of Negotiations Heading for Strike

As noted above, almost without exception, those fact finders interviewed were very cognizant of their public role. This role goes beyond simple reporting of the "facts" to the public and suggests that some fact finders view themselves as, in a sense, a representative or advocate of the public at the negotiation table and in the bargaining situation more generally. Accordingly, there is a role to be played in the protection of the public interest; nowhere is this role more clearly visible than when the fact finder is confronted by a situation which s/he sees as inexorably moving towards a strike.

A distinction must be made at this point, in terms of the appropriate fact-finding goal and strategy. In our system of labour relations, some strikes *are* inevitable in that they simply reflect the legitimate but conflicting interests of the parties and a high degree of resolve on both sides. These could be thought of both as an occasional inevitable and acceptable, if unfortunate, outcome of the system. While the fact finder can try to help the parties with their difficulties, it may simply be that nothing short of a strike will resolve the issues; paradoxically, the parties *need* a strike to make a decision. Again, while this sounds crude, the strike is the ultimate arbiter in a private-sector collective-bargaining system rooted essentially in the principle of bargaining power; the system certainly contemplates this outcome in its conception and design. The Bill 100 system is simply an adaption of this power-determined, private-sector model with extra protection for the public built in.

In short, any attempt to change this direction may be inappropriate and counterproductive: the parties are heading in that direction because each is defending its own legitimate interests, which it has every right to do. A fact-finding report which takes strong issue with those interests or with the parties' rights to pursue them – even to the point of a sanction – would probably be ignored by the parties and would help little in mobilizing public opinion (since both parties seem justified in their position). If it did succeed in changing the direction of the negotiations, that might simply exacerbate the problem and cause an even more bitter and protracted strike – this time or next time round. Hence, perhaps in this situation, the most the fact finder can accomplish is to set out for the public – and for a mediator who might follow – the realities of the bargaining situation.

Many strike-bound disputes, however, do not fit this description. They are less reflective of a rational protection of the legitimate interests of one's constituents than of other, less worthy, forces: a simple desire to win at all costs, to be vindicated, to "beat" the other side; personal political ambitions – to be seen by one's constituents (whether voters or members) to be tough and unyielding with the opposition; an absolutely adamant ideological position on a point of principle but without any pragmatic grounding; a chief negotiator (or any influential participant) working his/her own agenda, an agenda which does not have the wellbeing of the branch affiliate members, taxpayers, or schoolusers as top priority; a negotiation position which has been forced on a negotiation team against its better judgement by events, by factions of its own constituents or by its provincial federation or association; naivete, misjudgment, or incompetence on the part of one or, possibly, both parties; personal dislikes or hatred.

Clearly, disputes of this nature are in a very different category from the legitimate and theoretical model described above, and dictate a different goal – an therefore a different strategy – for the fact finder dealing with them. In short, it becomes the fact finder's goal to divert the parties (if necessary, against their will) away from a strike which is neither a rational nor a legitimate outcome of negotiation and which should therefore not be inflicted on the public. This is the clearest manifestation of the Talleyrand philosophy alluded to above: collective bargaining in the education sector is too important to be left solely to the teachers and the trustees. From time to time, someone else must step in and influence the process.

With this latter category, the goal then becomes to somehow change the direction of negotiations. Happily, this situation arises infrequently but, on the basis of both the fact finder interview conducted and fact-finding reports read, it occurs often enough that it is worthy of some note. Certainly, a conservative extrapolation based on the sample of fact finders interviewed suggests that if even half of these situations had actually gone to strike, the strike rate in most years would have doubled. Almost all of the fact finders interviewed had at least one instance in their experience in which a strike seemed highly probable if the parties continued in their present direction. Few of these potential strikes could have been counted in the "legitimate" category.

The strategy adopted in such a situation rested, first, on the writing of a report which the parties simply could not ignore; second, on the making of appropriate

recommendations; and third, in a very few cases, on both of these elements together with the threat of public exposure. This first condition is no easy task, given the realities of fact finding under Bill 100, but seems to depend upon the degree of public attention which already exists and/or which can be generated by a report itself (even though a possible strike may be some months off). The second element, obviously, is a function of the particular set of negotiations. Two profiles of such situations are discussed in Chapter 5.

3.

Does Fact Finding Help to Attain Settlements?

This question is central to the whole issue of fact finding. The answer, unfortunately, is difficult to pin down with precision. However, it is possible to approach the question obliquely and to begin to trace the rough outline of an answer. This approach presents evidence that fact finding can help the parties settle immediately, further into the future or, paradoxically, *before* fact finding ever takes place.

Fact finding might help attain settlements for two very different sets of reasons. First, it might aid settlement attainment because, in some way, it helps or pushes the parties who experience it towards agreement. Second, it might help because it is an experience some parties try to avoid and, in the end, there is only one way of avoiding it: by settling. This phenomenon is very obvious in rights arbitration, where a very large proportion of grievances scheduled for arbitration are settled by the parties before (sometimes minutes before) the hearing. Fact finding brings to a negotiation situation many of the same elements – a third party, delay, extra work and, above all, risk and uncertainty – as does arbitration, and it seems logical to hypothesize that it might well set up a similar incentive to settle on one's own first.

Figure 2 below is a frequency distribution graph of eleven years of settlements by month. The most obvious features are the very high peak of settlements in the month of June (by which time 28.2% of negotiating situations were settled), followed by a lower peak in September (by which point 46.3% were settled).

Given that very few jurisdictions bargain during July and August, it is not unreasonable to suggest that, in terms of actual bargaining time, in the Ontario teacher-board bargaining cycle, June is for practical purposes, equivalent to September. If settlements for June, July and August are superimposed on those for September, then the peak is even more striking and clearly suggest, by result, a major pressure point. This is represented by Figure III. The question is, from whence the pressure?

One explanation clearly is that the parties in a number of jurisdictions wanted to get the bargaining process over as quickly as possible and get on to other things, including the summer holidays. How many would be accounted for in this way

FIGURE II

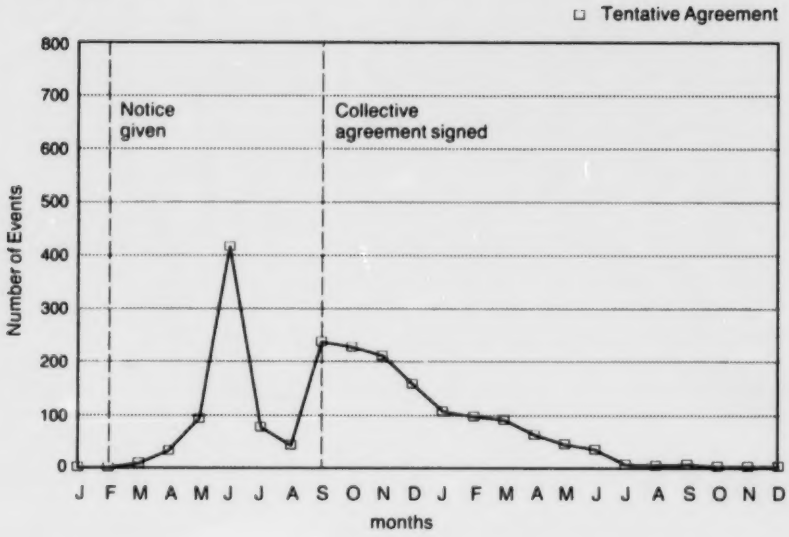
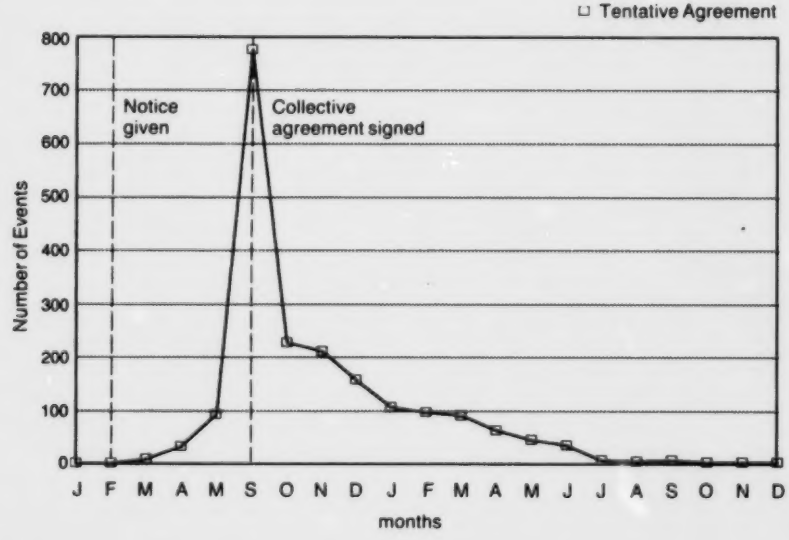


FIGURE III



cannot be determined, but it would not likely be a major proportion. A second explanation might be a local tradition of not wanting to begin the new school year without a new collective agreement. However, it is quite clear that there is no tradition of "no contract, no work" in Ontario education.

By a process of elimination, then, it can be inferred that an indeterminate but significant proportion of this 46.3% settled by September were at least prodded or given an incentive by the alternative to *not* settling on their own by that point – namely, fact finding. It has been suggested that the *real* incentive is not fact finding itself, but the "starting of the clock" toward sanctions. However, the record clearly demonstrates that that clock is likely to tick on for many months after fact finding before there is ever a strike, so the starting of the clock is unlikely to have been the incentive to bargain that the Statute's drafters originally envisaged it would be. In short, the time-of-settlement data suggest strongly that fact finding induces some of the parties to attain settlements on their own so as to avoid fact finding. This conclusion was also suggested by comments made by several questionnaire respondents.

The Relationship between Fact Finding and Settlements

What about those bargaining situations to which fact finding is applied? To what extent is the settlement rate of this group affected? This question must be examined in both the short and the longer runs.

With respect, first, to the short run, the data reveal that a significant proportion of negotiation situations to which fact finder are appointed settle either during the process or very soon after the fact-finding report goes public. These data are set out in Table I.

The data show that, on a weighted-average basis over the entire period since 1976, of the 859 negotiation situations to which fact finders were appointed: (1) 20.1% settled before a report was released to the parties; (2) 14.1% settled during the silent period, and (3) 12.7% settled within 25 days of the report going public.[30] This comes to a total of 46.9% of situations settling between the time of fact finder's appointment and 25 days after the release to the public of the fact finder's report.

It should also be noted that the above figures may understate the total because of the inclusion of the anomalous years, 1982–1983 and 1984–1985, when the system was going into and then out of the wage restraint of Bills 179 an 111 respectively. With the former, the great uncertainty as to the meaning and implications of the Bill and with the latter, the backlog caused by two and sometimes three years without negotiations slowed things down considerably in both years. The totals, without including data from these anomalous years, are 21.1% settling before a report was received, 15.1% during the silent period, and 13.5% within 25 days of the public release of the report, for a grant total of 49.8%.

One cannot conclude from this that fact finding immediately solves – or helps the parties solve – as many as 50% of the cases to which it is applied. Clearly, some

30. Dead periods, such as Christmas and summers, during which negotiations typically do not take place, were not counted in for this purpose.

of the 21% of the situations resolved before the issuance of a report did so without the parties ever seeing a fact finder, and would have done so anyway, with or without a fact finder. On the other hand, as noted above, it is reasonable to suppose that many such parties were motivated to settle in order to avoid the extra work and time as well as the unpredictability that fact finding entails.

Table I. Settlement Dates and Fact Finding/Negotiation Phases

Year	Fact Finder Appts.	Situations settled before report		Reports that didn't go public		Parties settling 25 days of public rel.		Total	
1976–77	71	20	28.2%	12	16.9%	15	21.1%	47	66.2%
1977–78	63	9	14.3%	12	19.0%	10	15.9%	31	49.2%
1978–79	114	19	16.7%	26	22.8%	11	9.6%	56	49.1%
1979–80	109	23	21.1%	11	10.1%	13	11.9%	47	43.1%
1980–81	49	6	12.2%	9	18.4%	5	10.2%	20	40.8%
1981–82	50	13	26.0%	8	16.0%	7	14.0%	28	56.0%
1982–83	62	10	16.1%	4	6.5%	5	8.1%	19	30.6%
1984–85	130	22	16.9%	16	12.3%	14	10.8%	52	40.0%
1985–86	81	19	23.5%	9	11.1%	6	7.4%	34	42.0%
1986–87	80	13	16.3%	10	12.5%	16	20.0%	39	48.8%
1987–88	50	19	38.0%	4	8.0%	7	14.0%	50	60.0%
Totals	**859**	**173**	**20.1%**	**121**	**14.1%**	**109**	**12.7%**	**403**	**46.9%**
Totals not including 1982–83 & 1984–85	**667**	**141**	**21.1%**	**101**	**15.1%**	**90**	**13.5%**	**332**	**49.8%**

Another portion of the 21% settling before the issuance of a report are those settled *during* the hearing by the fact finder. As noted earlier, fact finders are not encouraged by E.R.C. policy to mediate during fact finding. On the other hand, without exception, all fact finders interviewed reported that, if they sensed at the hearing that some issues might be easily settled, they would at least try to get them settled and off the table. Given the nature and purpose of the discussion at the joint hearing – in significant part, mediative by nature – it is easy to slide into the mediator's mode, almost unconsciously. Some fact finders are much more inclined in this direction than others; indeed, one fact finder has been appointed to eight assignments but has written only one report. In summary, it seems reasonable to conclude that, while by no means all of the 21.1% settled before the issuance of a report can be attributed directly to the process of fact finding, a high proportion can be.

With respect to the 15.1% of situations which settled during the silent period, it seems indisputable that they did so on the basis of the fact finder's report. Hence, the 15.1% is a solid number, in that virtually all such situations settled on the basis of the fact finder's report.

The third category – those settled within 25 days of the report going public – was included in trying to measure the immediate impact of fact finding in helping

the parties settle, because the fifteen-day silent period is very short and is much too restricted a measure for this purpose. To illustrate just how short it is, one need only look at what must be accomplished in the fifteen days after receipt of the report:

1. both parties must produce and distribute sufficient copies for the members of their committees;

2. all members of the two committees must read and digest the report (typically, 20 to 60 pages);

3. each committee must get together, discuss the contents and recommendations, decide on if and how they wish to make use of the report in their bargaining strategy and what they are prepared to propose to the other side;

4. the two parties must then get together to negotiate, and have enough time to reach a deal.

The scheduling of negotiations, a difficult enough problem most of the time, may be further complicated by the involvement of a mediator and his/her time constraints. Certainly, experience suggests that, after the report is received, there may simply be insufficient time to reach a deal within the 15-day silent period, even when it is extended, by mutual agreement, to 20 days.[31] However, with a little more time, the fact-finding report may still allow the parties to settle. While perhaps not all of the 13.5% settling within 25 days can be attributed to the fact finding, it seems reasonable to conclude that a very large number can be.

In summary, recognizing the fact that some situations would have settled anyway or settled for other reasons, in the negotiation situations to which fact finding has been applied, there has been a settlement in the immediate time frame approximately 47% of the time. If it had not been for the anomalies brought about by Bill 179 and 111, the figure would have been 50%.

As noted above, there is also a longer-term direct impact of fact finding on the settlement process: those situations which settle well after the report goes public but very close to the fact finder's recommendations. Here, typically, for a variety of reasons, the parties may not have made much progress in the period immediately after receiving the report but later – perhaps much later – for one reason or another, they return to some, most or even all of the fact finder's recommendations in the settlement stage. There are even instances on record of parties, having engaged in a long strike which started months after fact finding, settling essentially on the basis of the fact finder's recommendations.

To ascertain how many situations might be in this category requires a comparison of fact finding reports to collective agreements and, because of time constraints, that could not be done as part of this research. However, personnel in both the Field Services and Research section of the E.R.C. report that there are a number of such situations each year. Also, the 1979 E.R.C. research study on fact finding correlated fact-finder recommendations against collective agreements and found that

31. S. 26(3) of Bill 100 allows both parties to request, in writing, that the E.R.C. defer the date of public release by another five days.

fact-finder recommendations were accepted completely in approximately 60% of the cases and partially accepted in about 28%. Hence, it seems reasonable to conclude that, even when fact-finding reports did not directly result in settlements in the immediate short term, they were often significant help in the longer term.

It would be interesting and useful to compare these data – and particularly the 50% settled within 25 days of the public release of the report – to similar data from other jurisdictions in order to begin to determine how effective or ineffective fact finding under Bill 100 might be. Unfortunately, this is not possible since only one other Canadian jurisdiction uses fact finding, but in very different circumstances. However, the author would proffer the observation that a 50% short-run settlement rate is much higher than most of those associated with the process – parties, third parties, and E.R.C. personnel – would have supposed. Adding in the long-run settlements base on fact-finder recommendations as well as the early settlements induced by the desire to avoid fact finding would give a total settlement rate which is not unimpressive. The next portion of the paper explores some of the possible reasons that fact finding might help bargaining situations settle.

The Fact Finder's Recommendations

The questionnaire responses by the parties with respect to fact-finder recommendations, the influence of the preparation and hearing process and the impact of the report, seem to offer a partial explanation for the conclusions noted above, with respect to the both short and long terms.

As to the recommendations themselves, on the dimensions of acceptability to one's own party, fairness, adequacy of rationale and practicality of implementation, the percentage rating them as either a high or moderate degree ranged around the 70% region. These results are set out in Table II.

Table II. Attitudes towards Fact Finders' Recommendations

	Responses		
Dimensions	**Board**	**Teacher**	**Both**
Acceptability			
High degree	17.7%	31.3%	24.7%
Moderate degree	55.6%	33.3%	44.1%
Low degree	24.4%	35.4%	32.1%
Fairness			
High degree	19.6%	35.4%	27.7%
Moderate degree	56.5%	41.7%	49.0%
Low degree	8.7%	22.9%	16.0%
Adequacy of Rationale			
High degree	19.6%	25.0%	22.3%
Moderate degree	47.8%	45.8%	46.8%
Low degree	17.3%	29.2%	23.4%

Dimensions	Responses		
	Board	Teacher	Both
Practicality			
High degree	15.2%	25.5%	20.2%
Moderate degree	54.3%	40.4%	46.8%
Low degree	19.6%	27.7%	23.4%

While the degree of approval of recommendations in terms of the above four dimensions is about 70%, there is an interesting difference between the boards and the teachers in their responses. On all four dimensions, the teachers' responses are more dispersed than those of the boards: there are higher proportions in both the high- and low-degree categories. Stated differently, the boards have a higher proportion in the moderate category on all four dimensions. On the other hand, there is very little difference between the parties if the "high degree" and "moderate degree" categories are combined.

One other question also casts some light on the area of recommendations. The parties were asked to what degree they thought the fact-finding report outlined a potential settlement. The results to this question are set out below.

Great Assistance	10.8%
Some Assistance	35.5%
Little Assistance	25.8%
No Assistance	27.9%

In other words, 46.3% felt the report provided great or some assistance in setting out a potential settlement, while 53.7% felt it contributed little or no assistance.

As noted in Chapter 2, the "Strategy" section, the theory suggests a fact-finding report can push the parties towards settlement because it has the potential to embarrass one or both if it becomes public. The questionnaire therefore asked the parties "to what extent did the report expose an unreasonable or unwise position of the other side?" The responses were as follows:

Great Assistance	9.6%
Some Assistance	37.2%
Little Assistance	32.0%
No Assistance	17.5%

Thus in 46.8% of the cases, it was at least of some assistance and in 9.6%, great assistance.

The Fact-Finding Process

The parties' comments on the influence of the process itself (that is, preparations for the hearing and the hearing itself, as opposed to the report and its recommendations) on the negotiations may also help explain why something in the area of

50% of fact findings are associated with settlements in the short run, and particularly the 21% which occurred before the fact-finding report was submitted. Several of the questions related to this area and are set out, together with the responses, in Table III.

Table III. Influence of the Process Itself

Did the Process *force* You *to:*	
consolidate and clarify your position?	
Very high degree	4.9%
High degree	22.5%
Low degree	44.1%
Not at all	28.4%
reevaluate your position on the issue?	
Very high degree	2.0%
High degree	8.8%
Low degree	39.2%
Not at all	50.0%

These responses vindicated the feelings of some of the fact finders interviewed, as well as a number of the parties, that the hearing process and the parties' preparation for the hearing sometimes seemed to have a positive impact on the bargaining situation: it could give it a coherence, structure and order which may have been lacking before. In a sense, it was said, this process forced the parties to stop, take stock, reorganize and rethink, then clearly communicate their positions on the issues outstanding (sometimes for the first time) to the fact finder and, therefore, to each other.[32]

The above responses reveal that, in 27.4% of the cases, the process forced the parties to consolidate and clarify their own positions to a high or a very high degree. This feeling was slightly stronger with respect to the opposition: it was felt that in 29.3% of the cases, the "other side" was forced to consolidate and clarify its own position to a high or very high degree.

The parties were asked about any increase of clarity the process may have brought to the negotiation situation. The responses to the question "to what extent did the *process* clarify the bargaining situation?" The responses were:

To a very high degree	5.9%
To a high degree	14.7%
To a limited degree	44.1%
Not at all	35.3%

32. An interesting observation made by several of the fact finders interviewed suggested exactly the opposite influence of preparation for fact finding on a party's position – namely, that the putting together of a rationale and the committing of that rationale to writing seemed to "dig in" some parties even more. The perception was that, if it appeared in writing, it carried even more weight. In the view of those making this observation, while both parties reflected this dynamic, the teachers tended to be most affected by it.

Thus, in 65% of fact finding, the negotiation situation was clarified at least to a limited degree and in 20.6%, to a high or very high degree.

Given the complexity of the issues and process and the difficulty of organizing teacher-board bargaining disputes, it seems reasonable to suggest that this enforced consolidation, reordering and clarification could not help but make some positive contribution to the bargaining process.

Reevaluation of positions also took place, with 10.8% of the parties reevaluating their own positions to a high or very high degree. 12.5% of the opposition was seen to have reevaluated its position to a high or very high degree.

The parties were also asked whether this process of rethinking actually caused them to modify their positions on any issues outstanding and the degree to which they felt the other side had modified its position. The responses are shown below.

Table IV. Influence of the Process Itself

	Responses		
	Board	**Teacher**	**Both**
Did the Process cause You to modify your position?			
Very high degree	2.0%	0.0%	1.0%
High degree	2.0%	6.0%	3.9%
Low degree	39.0%	51.0%	45.1%
Not at all	57.0%	43.0%	50.0%
Did the Process cause The Other Party to modify your position?			
Very high degree	6.0%	8.0%	7.2%
High degree	2.0%	8.0%	7.2%
Low degree	40.0%	33.0%	36.1%
Not at all	52.0%	51.0%	51.5%

Interestingly, while the parties saw both themselves and their opponents as modifying positions to a high or very high degree in 4.9% of the cases, they saw their opponents as almost three times more likely than themselves to modify their position to a high or very high degree (12.4%). In any case, these data appear to vindicate fact finders' feelings that the very process itself – quite apart from the report – can have a positive effect upon some negotiations.

In sum, then, on the question of the degree to which fact finding actually helps the parties to settle, analysis of the data as well as the interview and questionnaire responses of fact finders and the parties suggest the following:

(a) Fact finding provides an inducement for many parties to settle as a means of avoiding the process in exactly the same way as rights disputes tend to settle prior to the arbitration hearing. The number of settlements accounted for by this is indeterminate but, likely, quite significant;

(b) of the negotiation situations to which fact finding is actually applied, approximately 50% settle more or less immediately (i.e. within 25 days of the public release of the report);

(c) fact finding is helpful, to a significant but indeterminate degree, in many of the situations which, for a variety of reasons, settle much later than 25 days after public release;

(d) the *process* itself can help because it brings a structure, coherence and degree of communication (which may have been lacking before) to the negotiations and forces the parties into a reevaluation of their positions.

(e) the *report* helps because the recommendations, which the parties rate highly in terms of fairness, rationality, and practicability, can proffer a potential settlement and, to a limited degree, because the report has the potential to embarrass one or both of the parties.

It is most important to keep in mind, in considering these settlement rates, that the situations to which fact finding is assigned are intrinsically the most difficult. Figure II, above, reveals that, on average over time since 1976, 28% of all negotiation situations have settled by June and 46% by September. It is reasonable to conclude that many of these were relatively easy situations; the other 54% were the more difficult ones, on the whole, and hence the ones to which fact finding is assigned. In this context, the settlement rates noted above are even more impressive, particularly in view of the fact that, in contrast to other dispute-resolution statutes, the parties under Bill 100 have the theoretically complete freedom to ignore fact-finding recommendations.

4.

Does Fact Finding Delay Negotiations?

Do Teacher-Board Negotiations Take Too Long?

The most frequently heard criticism of Bill 100 is that negotiations tend to be too long and drawn-out. Further, one of the most frequent criticisms of fact finding is that it delays the process and is, therefore, a principal cause of the lengthy negotiations. Certainly, both of these notions featured prominently in a number of the submissions to the legislative committee reviewing Bill 100.

In point of fact, however, in terms of real negotiating time, the evidence suggests that negotiations in the Ontario teaching sector do not take substantially longer, on the whole, than those in the rest of the Ontario collective bargaining population. On the surface, and given the statutory requirement to give notice to bargain by January 31, teacher-board negotiations *seem* to take a long time. However, the assumptions that negotiations begin in January and continue uninterrupted until a settlement is attained significantly overstate the actual negotiation time simply because, in the vast majority of cases, negotiations do not really begin until considerably later than January, and they stop for at least two months during the summer. Any valid comparison of length of negotiations must take those factors into account. When this is done, the results suggest that, while there are many fewer very early teacher-board settlements, on the whole, there is no significant difference in length of negotiations between those in the Ontario teaching sector and the unionized labour force generally. The actual comparisons appear in Table V and are based on the assumptions that negotiations actually begin on March 1 and cease for July and August.[33]

33. Two points should be noted with respect to these comparisons. First, the Ministry of Labour data measure the length of negotiations from the first actual negotiation meeting. The E.R.C. data on teacher negotiations, on the other hand, measure it in terms of date of tentative agreement. In view of the normal pattern of teacher negotiations, with the formal giving of notice by January 31 but the first actual meeting some considerable time after that, March 1 has been taken as the assumed commencement date of actual negotiations. This is a conservative assumption, as many sets of teacher-board negotiations do not really get started until well after March 1. Second, allowance has been made for the fact that, in the great majority of cases, Ontario teacher-board negotiations adjourn for the summer. Consequently, for comparison purposes, the months of July and August have not been counted.

Table V. Time to Settlement

	Between 1-3 Months	Between 4-6 Months	Total Settled after 6 mos	Between 7-9 Months	Total Settled after 9 mos	Between 10-12 Months	Total Settled after 12 mos	>12 Months
1986								
Teachers	8.37	54.37	62.74	17.45	80.19	18.80	98.99	0.67
All	30.40	31.50	61.90	8.40	70.30	17.80	88.10	11.90
1985								
Teachers	7.02	39.45	46.47	35.14	81.61	15.68	97.29	2.70
All	35.80	25.70	61.50	21.20	82.70	9.40	92.10	7.90
1984								
Teachers	6.44	28.61	35.05	32.62	67.67	20.60	88.27	11.56
All	49.00	34.90	83.90	12.00	95.90	3.60	99.50	0.50
1983								
Teachers	11.19	67.84	79.03	9.79	88.82	5.60	94.42	4.90
All	63.20	27.50	90.70	5.90	96.60	1.80	98.40	1.60
1982								
Teachers	10.00	50.58	60.58	19.42	80.00	9.41	89.41	10.59
All	40.90	33.50	74.40	17.20	91.60	4.10	95.70	4.30
1981								
Teachers	7.65	61.78	69.43	20.38	89.81	7.64	97.45	2.55
All	22.60	36.10	58.70	13.70	72.40	13.50	85.90	14.20
1980								
Teachers	6.72	61.95	68.67	14.92	83.59	14.92	98.51	1.50
All	33.00	36.10	69.10	13.40	82.50	6.30	88.80	11.20
1979								
Teachers	2.73	38.79	41.52	24.13	65.65	20.31	85.96	14.22
All	12.10	34.30	46.40	22.40	68.80	13.10	81.90	7.80
1978								
Teachers	4.77	46.65	51.42	31.43	82.85	11.90	94.75	5.25
All	29.1	30.1	59.20	27.60	86.80	7.80	94.60	5.40
1977								
Teachers	10.38	62.74	73.12	17.92	91.04	6.61	97.65	2.36
All	36.50	35.70	72.20	17.20	89.40	6.40	95.80	4.20
1976								
Teachers	6.05	59.79	65.84	27.47	93.31	4.40	97.71	3.30
All	23.00	35.70	58.70	22.70	81.40	15.20	96.60	3.40
Totals								
Teachers	7.39	52.05	59.44	22.79	82.23	12.35	94.58	5.42
All	34.15	32.83	66.97	16.52	83.49	9.00	92.49	6.58
Proportions Settled, not including 1984								
Teachers	7.49	54.39	61.88	21.81	83.69	11.53	95.21	4.80
All	32.66	32.62	65.28	16.97	82.25	9.54	91.79	7.19

As noted above, there are many fewer teacher-board settlements in the 1-to-3-month period; on the other hand, in almost all years, there are significantly more teacher settlements in the 4-to-6-month period, so that the cumulative settlement rate at the end of 6 months is very close. A glance at the "total settled after six months" column shows that, with the exception of the 1982–1985 period, settlement rates for teachers and the entire population are roughly equal. In one of those years,

1984, the public-sector system was exiting compensation controls, as a result of which the negotiations were slowed considerably. Taking all eleven years into account, it will be seen that the cumulative proportion of teacher-board disputes settled after 6 months is within 7.5 percentage points of that of the population and, after 9 months, is virtually the same. Removing the anomaly of 1984, the 6-month cumulative settlement rates are within 3.4 percentage points of each other and the 9- and 12-month cumulative rates are better for teachers than for the population. It should be borne in mind, in this regard, that negotiation practices in teacher-board collective bargaining seem to be intrinsically different from those often used in the private sector, where the parties will plan to negotiate fairly steadily for several weeks. The teacher-board mode tends much more towards an evening meeting every second week. In other words, the pace (early on, at least) is intentionally slower.

One qualification should be noted about these data. First, the total bargaining population includes both private- and public- sector situations and, while the Ministry of Labour did not distinguish between public and private prior to 1983, the data since that year indicate clearly the public-sector negotiations take considerably longer than private. Accordingly, while it can be concluded that, measured in terms of the 6-month cumulative settlement rate, teacher-board disputes seem to be just about on par with the entire collective bargaining population, they are, in point of fact, longer than most of the private but shorter than much of the public sector.

This is not to suggest that teacher-board negotiations in Ontario do not take too long. However, it is to point out that, when looking at a sector with inherently complex and problematic issues and a difficult and seemingly ever-changing environment, in the context of the total collective bargaining population – and particularly that of the rest of the public sector – the record is not a bad one.

That this is so is both significant and surprising since virtually everyone involved in the process, including the author, other third parties, the parties themselves, and the E.R.C., seems to have accepted the inordinate-length observation as self-evident and indisputable. Given that this has been one of the major criticisms of Bill 100 and that fact finding has always been cited as a principal cause of lengthy negotiations, this finding casts the process of fact finding, and Bill 100 more generally, in a somewhat different light.

Nonetheless, the question raised in the chapter title is still worth explaining: even if Ontario teacher-board negotiations are, on average, not significantly longer than those of other sectors, fact finding might still make them longer than they need to be.

Does Fact Finding Slow Down Negotiations?

In looking more carefully at this question, two separate ideas emerge. First, there is the observation that fact finding wastes a lot of time and interrupts the bargaining process, perhaps at a critical juncture. Second, it is asserted that fact finding slows down prior negotiations. Each of these dimensions will be examined.

The Interruption of Negotiations

Many of the parties clearly believe that fact finding interrupts and impedes the negotiation process. As one of the teacher respondents put it in the questionnaire:

> . . . Positions of both parties were well known – fact finding delayed momentum and progress.

And one of the school boards in its submission to the legislative committee:

> . . . The process of fact finding of itself brings negotiations to a halt for a considerable period while the parties prepare detailed summaries necessary for the fact finder.[34]

Self evidently, since the fact-finding process itself takes at least thirty days[35], the observation that negotiations are interrupted is a valid one. However, this criticism must be viewed in the light of the issues which might be cleared off the table by the fact finder at the hearing, the fact that roughly 21% of situations settle after a fact finder has been appointed but before any report is submitted as well as the 15% of reports which result directly in a settlement. As well, the very process of preparing briefs for the fact finder contributes to each party's refining of its views. In other words, while negotiations themselves may be interrupted, the evidence suggests very strongly that, in many cases, *negotiating progress* is not. Indeed, in a significant number of situations, it is accelerated.

This question should also be viewed in the context of the negotiation cycle for teachers and boards.[36] As noted in Chapter 2, negotiations very seldom take place during the summer. It seems somewhat incongruous, then, to criticize fact finding for a thirty- to forty-day interruption of negotiations when the parties, by their own custom and choice, typically stop bargaining for a period of seventy to ninety days over the summer. One should perhaps take note of the irony of this situation: while many private-sector negotiations intensify as the expiry date of the agreement approaches, teacher-board negotiations screech to a halt two months before.

To recapitulate, then, fact finding does indeed "interrupt" negotiations, but for a short time relative to the self-imposed interruption of the summer holidays, and in a way which may bring about significant progress in the negotiations.

Does Fact Finding Impede Negotiations ahead of Time?

The second dimension to the delaying-of-the-process criticism rests on the assertion that one or both of the parties wait for fact finding before they engage in any real bargaining. Indeed, this notion figured prominently in the questionnaire responses.

34. Metropolitan Toronto School Board Brief to Ontario Legislature's Standing Committee (1987).
35. Since the parties typically stop bargaining when the decision is made to call for fact finding or, at least, when the E.R.C. agrees to make an appointment, the delay in negotiations is actually longer than thirty days.
36. There is some variation from year to year, but the basic pattern has remained the same through the years since 1976.

To cite some examples:

> . . . In our case, the Board rarely has any work done ahead of time and fact finding forces them to put together some positions.
>
> (teachers)

> . . . Seems that serious negotiations don't take place until the clock is started.
>
> (teachers)

> . . . Both parties can wait and use up-coming fact finding as a way to avoid meaningful negotiations.
>
> (board)

There is significant evidence that this charge of little real bargaining before fact finding is well founded for a large number of those negotiation situations which go through the process. However, it is not at all clear that this phenomenon is *caused by fact finding itself*. The negotiating parties' opinions on this aspect were canvassed in the questionnaire, as they were in 1979,[37] and appear ambivalent. The question most directly relevant to the delaying effect was "what effect did the prospect of fact finding have on ***prior*** negotiations?" The responses were as follows, along with comparable responses from 1979:

Table VI. Effect of the Fact-Finding Process on Prior Negotiations

	Year	
Effect	1979	1987
Sped up negotiations	20.6%	9.6%
Delayed serious bargaining	20.6%	27.9%
Had no effect	43.8%	55.8%
No opinion/don't know	3.1%	2.9%
Other	8.8%	3.8%

As in 1979, there was not a great difference between teachers and boards in their responses to this question, aside from the fact that, this time round, more boards than teachers (33% versus 23%) felt that fact finding delayed serious bargaining. On the other hand, slightly more boards than teachers also believed that fact finding sped up the negotiations (9.8% versus 9.4%).

The proportion of respondents who felt that fact finding sped up prior negotiations fell by 11% from 20.6% in 1979 to 9.6% in 1987 and, conversely, the proportion of those who felt that it delayed real bargaining rose by 7.3% to 27.9% in that time. Also, a large number of the parties made observations on their questionnaires to the effect that, for example, " . . . it is our opinion that factfinding serves only to delay negotiations."

On the other hand, 58.8% (13% more than in 1979) felt that fact finding had no effect on prior negotiations. Adding the "sped up" responses to the "no effect"

37. Education Relations Commission, *op.cit. p. 73.*

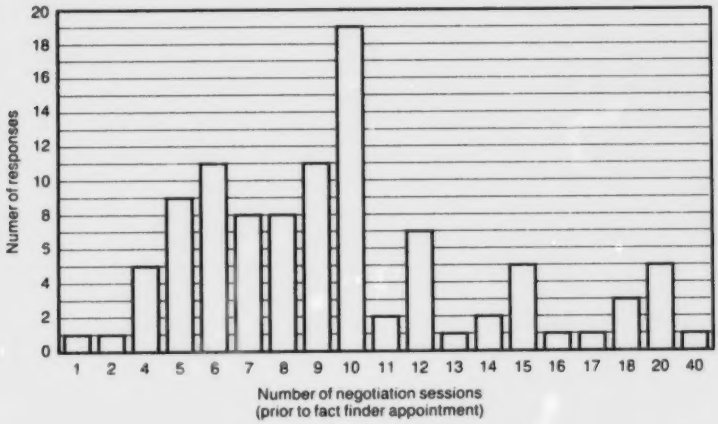
responses reveals that this total has remained virtually the same.

1979	1987
64.4%	65.4%

Overall, then, the signals on this question seem at best ambivalent and, despite the oft-heard complaints about fact finding, it is not at all clear from the data that the parties really do see fact finding as a major cause of delay.

What does seem clearly established is that, in a significant number of instances, there is little evidence of any *real* bargaining prior to fact finding.

Figure IV



First, consider the evidence of fact finders themselves. As noted in Chapter 2, there was strong agreement amongst the fact finders interviewed that in a large proportion of fact-finding assignments – even those as late as November or December – one is faced with a very large number of issues and little evidence of any *real* negotiations progress by the parties. In short, the parties are very often still stuck in Phase I or the early stages of Phase II of the negotiation process when the fact finder comes in.

The parties' responses on the questionnaire bear out this conclusion as well. One of the questions asked was, "approximately how many negotiation sessions had there been prior to the fact finding appointment or hearing?" The frequency distribution of responses is set out above in Figure IV. Perhaps the most important statistics to emerge are the median of 9 sessions, the mean of 9.8, and the mode of 10. What is noticeable, too, is the apparent "breakpoint" between 10 and 11 sessions; few negotiations seem to go beyond 10 sessions without fact finding.

Bearing in mind that, in the normal progression of negotiations, several of the early meetings would be quite short and perfunctory, the fact that many of the

meetings would take place at night and have a time limit attached to them, as well as the fact that, for an October fact finding (for example), the parties have theoretically been bargaining for six months, not counting July and August, 9.82 sessions represents relatively little *real* negotiation time. In fact, given the unusually large number of issues which typically find their way to the teacher-board bargaining table in Ontario, 9.8 sessions is hardly enough time to canvass all the issues even once properly, much less to start making progress by putting out positions and dropping some demands.[38]

This indication of little true bargaining seems reinforced by the parties' responses to the question, "how many of the outstanding issues had been thoroughly discussed before the fact finding hearing?" These are set out below.

Responses	% Distribution
All	62.5%
Most	26.0%
Few	9.6%
None	1.9%

It seems reasonable to expect that, for true impasse to have occurred, virtually all of the outstanding issues should have been thoroughly discussed. In 37.5% of the situations, all of the outstanding items had not been thoroughly discussed and, in 11.5%, few or none had. The interviews with fact finders and the fact-finding reports reviewed also revealed that, in an alarmingly large number of situations, virtually *nothing* of any consequence had been settled. Quite often, too, important or quasi-important issues had not been discussed at all.

The figure of 9.8 sessions and the incomplete discussion of the issues must be viewed in the context of the stated purpose of fact finding – namely, an *impasse-resolution procedure*. The resolution of impasses is the role served by fact finding in the United States and in the Canadian federal jurisdiction and, as Professor Downie pointed out with respect to fact finding under Bill 100,

> . . . A fact finder is to be appointed by the E.R.C. when negotiations reach impasse, either in the opinion of *one* of the parties . . . or in the opinion of the E.R.C. alone. Also, the *act* assumes that impasse has been reached if there is no settlement by the time the collective agreement expires.[39]

In one sense, this accords with the parties' own perceptions. When asked on the questionnaire, " . . . did the parties reach an ***actual*** impasse ***before*** the fact finder was appointed?", 75% responded that there *was* an impasse and 25% that there was not. Interestingly, both parties agreed on this, although the teachers considerably more strongly (teachers, 84.7%; boards, 66.7%).

38. As one other measure, the joint fact-finding session typically will last from five to ten hours. All that is accomplished in this time is that the outstanding items and the parties' positions are explained - once and fairly superficially. There is no back-and-forth negotiation or discussion. Negotiators could easily spend one entire 8-hour session dealing with only one or two issues (of perhaps 30 to 60 on the table). In this light, 9.8 sessions is even less impressive as a true effort to explore the situation, negotiate and make moves.

39. B.M. Downie, *op.cit.*, *p.82*

On the other hand, even a rudimentary understanding of negotiations makes it clear that experienced negotiators should not find themselves truly at impasse – in the normal sense of that term – after such a short period of actual negotiation, especially when spread out over a number of months and when virtually nothing has been dropped from the initial demand lists.

Thus, we are faced with an apparent contradiction. On one hand, 75% of those using fact finding claimed that they were facing an impasse; on the other hand, in terms of the objective evidence of a very limited amount of time spent negotiating, an incomplete canvassing of the issues in almost 40% of the cases, and the small number of issues resolved, it is impossible to conclude that a true impasse could posssible have been reached in very many of these cases, much less in 75% of them. In fact, as noted in Chapter 2, it is difficult to conclude that the parties are very far, if at all, out of Phase I, much less into Phase III.

The answer to the paradox may be an obvious one. A normal model of bargaining assumes some progress and convergence towards the settlement range, in terms of the dropping of some demands and the modifying of positions on others by both parties, *before* impasse sets in. All too often in Ontario teacher-board disputes, however, impasse sets in *without much or any progress* from initial positions having been made. The parties may have tried – to the extent of meeting a number of times – but neither has substantially modified its position. In short, impasse has set in in Phase I of negotiations.

This phenomenon has several possible explanations. First, it is possible, if improbable, that some of the parties do not understand how to negotiate. One can at least make the observation that in many cases they seem to make negotiations very difficult for themselves by putting too much on the table. There is no question that both parties – and particularly the teachers – do tend to overload negotiations with demands; this seems very clear from fact finder interviews as well as from the reports themselves. Many of the fact finders interviewed expressed the view that the teachers not only put too much on the table, but then seem unable to set any priorities with respect to it. In the words of one interviewee, " . . . they seem incapable or unwilling to make decisions."

As noted, a number of fact finders have commented on this penchant of the teachers to place a large number of items on the table, a strategy – if that is what it is – now being emulated by boards. It has also been observed that the negotiations process has a finite capacity to deal with issues and, when overloaded with issues (many of which are very complex), seizes up just like any other overloaded system – the "logjam" or "gridlock" effect. In short, because the system is incapable of dealing with such a load, no progress whatsoever is made. The only thing that really does happen is that the participants become angry and frustrated – the trustees, since they are on the receiving end of most of the demands, and both parties because no progress can be made. Several fact finders observed that, not only do some trustees become upset with what they perceive to be an excessive number of demands, they tend to react particularly strongly to the so-called "provincial items" (i.e. demands from provincial federation headquarters) for which they see no relevance in their

particular setting. The same can be said for the teachers when they see an item suggested by a trustee association on the board's lists of demands.

One final comment with respect to the excessive-number-of-demands problem should be made. Teachers have often commented – as they did on the questionnaire – that their trustees do not negotiate until forced to, by fact finding or by some other deadline. "They simply stonewall," in the words of one negotiator. "Up until fact finding, the only answer we ever get from the board – on anything – is 'no'; seldom even an explanation." Being faced with an excessive number of demands makes this strategy easy.

Quite apart from the overloading of the system, one or both of the parties may be incapable of effectively negotiating for any combination of other reasons as well: inexperience, the frequent turnover of teacher and board chief negotiators, large, unwieldy and fractious negotiating teams, to cite some of the main problems.

A second and much more probable explanation is that parties know how to negotiate, but are *unwilling* to do so. Negotiation is essentially a decision-making process, the decisions being: (1) what initial requests to make; (2) where to start on each item and, most important; (3) when and how to *move* by dropping some demands and modifying one's position on others. Subject to what was said above, while there might be no problem with decision categories (1) and (2), one or both of the parties may be unwilling to make the tough decisions of category (3), the dropping of some demands and modification of positions on others.

Public-sector negotiations take place in a highly visible and political environment where it is very much in the interests of the leaders on both sides of the table to appear to their respective constituents to be tough, highly resolved and unyielding by refusing to budge from their initial positions. In addition, there can be good tactical or strategic reasons for the parties to "drag out" the process. In a tactical sense, both parties may not be anxious to hurry the process; time is on the side of the trustees, while the teachers do not want to call for premature last-offer-received or strike votes. Most importantly, in a sector where pattern bargaining is so prevalent and where one's ranking is a measure of one's negotiating success, neither side may want to agree on a deal which, six months after the fact when other settlements have come in, makes theirs look bad.

Negotiators can afford the luxury of not negotiating, however, only when an important condition is satisfied: there must be an absence of pressure on the parties. Parties in negotiations make decisions to modify their positions, not because they want to, but because failure to do so invites a less desirable result. When there is little threat of such a worse result – as is the case, arguably, in the January to September period of the negotiation cycle in Ontario – there is no reason to make tough decisions and, perhaps, many reasons not to. As noted earlier, the only real threat to the parties in this period is from fact finding in September and, clearly, in many cases that is not nearly enough.

As noted, the parties may not want to settle this early. Nor – and this is the third explanation – is it easy to settle early in this sector. The issues are complex and intractable; grant and funding announcements are made late in the year, as are the next year's enrollment projections. As well, the negotiators, for the most part,

have other, full-time jobs. The Ontario education sector is a difficult and turbulent environment anyway, and collective bargaining is not accomplished easily.

In summary, to accomplish a June settlement requires that a number of conditions be in place:

a) the parties must have a reasonable relationship;
b) the parties must be competent and efficient negotiators;
c) both parties must be willing to risk what amounts to an early settlement and one which, in light of the settlement pattern as it has developed six or eight months later, may make one of them look bad;
d) there must be no complicating political factors, such as the influence of a board election or inter- or intrafederation difficulties;
e) there must be no high-priority, highly controversial items on the table;
f) both parties must want an early deal;
g) nothing else must go wrong.

Needless to say, the presence of all of these conditions together is itself not an everyday event. Hence, the realities of teacher-board collective bargaining in Ontario create a significant group of negotiations which, by virtue of inability, unwillingness, or some combination of the two, are not settled by September. Given s. 14 of Bill 100, which in theory makes fact finding mandatory for all of these situations, and which makes it *de facto* mandatory once one of the parties so requests after September 1st, a significant number of this group inevitable will end up at fact finding.

Thus, by virtue of the realities of Bill 100 and Ontario teacher-board collective bargaining, the parties are, in a sense, "conditioned by experience to expect to go through fact finding," in the words of one fact finder interviewed. Numerous parties, both teachers and boards, made similar comments on their questionnaires. While expressed in various ways, these all amounted to the notion that "it's part of the process." Perhaps, too, the parties have been simply conditioned by the same forces to see themselves at impasse when they do go to fact finding.

In summary, there are at least four reasons for the absence of negotiation progress prior to the fall term and fact finding: (1) a lack of negotiation expertise, (2) negotiators *unwilling* to make the tough decisions which constitute the heart of real bargaining, (3) an environment which makes early progress and settlement intrinsically difficult, and (4) a lack of pressure on the parties other than the prospect of fact finding. None of these reasons relates to the fact-finding process itself but, to many of the parties, fact finding has become part of the process they expect to go through.

Is there, on the other hand, anything in fact finding which also induces the parties not to bargain ahead of time? Is there, for example, the so-called "chilling effect," for which interest arbitration has been indicted? "Chilling effect" is the name given to the notion that the parties, knowing an arbitrator will ultimately come in and impose a settlement if they do not agree and assuming that the arbitrator will split the difference, stake out more extreme positions than they otherwise would

have, hoping to benefit from their extreme positions. Further, knowing that the arbitrator will take the public responsibility for the settlement, the parties are happy to let that happen.

Given the way fact finding is supposed to work, holding back concessions would be exactly the wrong strategy for the parties to follow. Given the fact finder's role of commenting candidly on the parties' positions and bargaining behaviour, an extreme and inflexible position and a large number of issues still outstanding should expose one or both of the parties to criticism in the report. It would give the fact finder ammunition to use in fashioning a hard-hitting report with the potential to embarrass. Indeed, this has happened. Logic therefore suggests that fact finding should not induce the "chilling effect" to any significant degree in the hope of getting a better report and set of recommendations – to the contrary, in fact. It should again be noted, however, that the foregoing analysis is predicated on the way fact finding *is supposed to work*. That is to say, it assumes that both the carrot and the stick elements are present in the fact finder's strategy.

Another way of examining this issue is by looking at how fact finders actually make their recommendations. As noted in Chapter 2, fact finders make their recommendations on the basis of (1) their view of what the patterns, data and environment suggest is an appropriate outcome on individual issues and (2) their estimate of what the parties may ultimately accept in terms of a package. Principle #2 may result in *some* splitting of the difference, but a review of fact-finding reports makes clear that fact finders have no hesitancy in recommending that a majority of demands be dropped even if, as is normal, most of those originate with one party. More importantly, fact finders are not likely to make recommendations – at the individual or package level – which are not supportable and credible in the context of the broader bargaining environment. That broader bargaining environment is made up of deals which, over time since 1975, have been freely negotiated by the parties (i.e. without the influence of a fact finder's recommendations) 65% of the time.

On the other hand, the certainty of fact finding sometime in the fall could contribute to non-negotiation before June in certain other ways. For example, as noted earlier, the fact finder provides a convenient scapegoat for negotiators on either side of the table who might not wish to make – or take responsibility for making – the decisions they *know* have to be made. That may be an advantage worth waiting for.

As well, fact finding provides the parties with a way of reestablishing the negotiation process and getting some momentum after the summer break. In a real sense, someone else does much of the parties' work for them. They are provided with a disciplined and structured process: all they have to do is respond to an initiative provided (a) by the requirements of Bill 100 and (b) by the fact finder's recommendations. Perhaps, and paradoxically, then, the existence and virtual certainty of fact finding in the fall may be an added inducement for parties not to reach agreement in June and to break off negotiations until the fall; someone else will get them started again.

There is another aspect to this as well. As noted on page 55, a number of the parties made comments critical of fact finding on their questionnaires to the effect

that the other side never becomes serious until fact finding.

> . . . In our case, the Board rarely has any work done ahead of time and fact finding forces them to put together some positions.
>
> (teachers)

> . . . Seems that serious negotiations don't take place until the clock is started.
>
> (teachers)

This observation – which one hears frequently as a criticism of fact finding – seems to be saying that fact finding is a pressure point but that, because it occurs in September, there is no incentive to negotiate before that. While this appears to be a reasonable observation, it seems somewhat perverse when made as a criticism of fact finding. Surely it is really saying that fact finding works and, perhaps, that it should happen earlier.

In summary, then, while there is abundant evidence, that, in a significant number of cases, the parties have made little progress at the bargaining table prior to fact finding in the fall, an analysis of the evidence suggests that this is far less a function of fact finding itself than it is of the parties, the negotiation process, the nature of the issues and the lack of much incentive to make hard decisions before the summer. Also, while fact finding does interrupt negotiations, the delay it causes is short compared to the self-imposed summer-holiday interruption and it does so in a way which may contribute to progress. Finally, if fact finding is carried out properly, in the intended manner, there should be no incentive for the parties to adopt and adhere to extreme positions before fact finding.

5.

Can Fact Finding Prevent Strikes?

Outlined as a role of fact finding in Chapter 2 was the changing of the direction of negotiations heading for a strike. Happily, this is not often necessary but, given the realities of collective bargaining and the very human elements which influence it, some negotiations inevitable and inexorably head towards breakdown and strike.

This is a difficult dimension to test empirically. The parties, when asked on a questionnaire whether fact finding increased or decreased the probability of a sanction, overwhelmingly responded that there was no impact.

	Both	Teachers	Board
Increased	12%	6	18
Decreased	14%	19	10
No effect	75%	76	72

As noted before, however, most fact finders interviewed reported at least one instance where they felt the situation was clearly heading towards a strike, and the fact-finding report, one way or another, changed the course of negotiations away from a strike.

By way of illustration, two profiles of such disputes have been set out below. It must be made very clear that the following profiles reflect the point of view of the fact finder him/herself, and not those of the parties.

Situation A

- an historically poor relationship between the parties – a protracted strike in the previous round of negotiations and bitter feelings remaining on both sides
- as a result of the previous strike, intense public and news media interest in the current negotiations
- an issue perpetuating the teachers' resentment (in this case, having a very low grid in the provincial distribution for an extended period of time)
- insistence by the Board, in the current round, of some major and symbolic "takeaway" – in this case, grandfathering of the retirement gratuity – ostensibly in return for a major salary "catchup"

- in fact, however, a very small monetary increase offer
- an abrasive approach at the table by both parties
- the involvement of an outside chief negotiator by the Board, and the presence of a representative of the provincial teacher federation
- some players on each side, who, for their own reasons (in the fact finder's opinion), would not have minded a strike.

Fact Finder's Diagnosis of Situation

The board's insistence on grandfathering the retirement gratuity, the teachers' very low grid rank in the province, the involvement of several outsiders and a variety of players with different agendas – all in the wake of a protracted and bitter strike – virtually guaranteed a strike.

Strategy

The first challenge for the fact finder was to write a report that *would* not be ignored by the news media and local population and therefore *could* not be ignored by the parties. In contrast to most fact-finding situations, this was relatively easy since, because of the strike in the last round of negotiations, the public and the media were watching carefully. The report was kept as short as possible, made some dramatic recommendations, and began with a categorical statement to the effect that, if the parties keep going in the same direction, a strike was a virtual certainty.

That done, the fact finder had to decide what set of recommendations to make. Convinced that one of the keys to the poisonous relationship and bargaining situation and *the* trigger for any strike was the very low salary position of the teachers, the fact finder made the elimination of this position the central component of his recommendations; that would both remove a major obstacle to negotiation progress and help to improve the relationship over the long term. The fact finder's recommendation – to bring the teachers up to the provincial median salary – was to be phased in over a two-year agreement, with split grids, so as to minimize the dollar cost to the Board. The fact finder also recommended that the Board drop its insistence on the grandfathering of the retirement gratuity for this round and suggested that the parties try to work out some more creative and mutually satisfactory alternatives over the term of the next agreement.

The Board accepted the thrust of the recommendations (to the great chagrin of its outside negotiator), put on the table something close to the dollar amount recommended in the report, and modified its position on the retirement gratuity. Negotiations went on for some five more months with intensive mediation but, with a major end-rate salary offer on the table, any credible basis for a sanction was greatly reduced. All in all, while certainly not a neat or precise process, fact-finding, in conjunction with mediation, dramatically changed the direction of negotiations and helped prevent what was almost surely destined to be a second bitter strike.

Situation B

- a board very hard-pressed by the public to effect economies
- a school system with significantly declining enrollment
- an economically depressed area, suffering very high unemployment
- a highly unusual clause in the agreement which conferred on the teachers virtually absolute job tenure
- a local newspaper following the teacher collective bargaining scene very carefully, with stories highly critical of the retirement gratuity and the teacher' tenure clause
- the board demanding the elimination of the tenure clause
- the teachers adamantly refusing elimination of the tenure clause
- the teachers' branch affiliate apparently being strongly supported by its federation in its stand on this issue

Fact Finder's Diagnosis of Situation

If the teachers did not give in on the tenure clause, there was certain to be a strike, which they would lose decisively.

Strategy

Here, too, there was no problem with publicity, since the news media had been taking a strong interest in the education situation generally and collective bargaining specifically, and negotiations were being watched carefully. Hence, the report could be written in the certain knowledge that, if properly done, it would receive considerable attention.

Given this context, the fact finder then wrote a report, the first half of which was an attack on the tenure clause; using everything from comparisons with all other collective agreements in the country – teacher and non-teacher – to Gallup Poll data, the fact finder tried to demonstrate two things: (1) it was completely unreasonable and unrealistic for the teachers to expect to retain such a clause and, one way or the other, they would end up losing it anyway; (2) the only sensible strategy for them was to trade it off for some concessions which were more useful to them. The second half of the report set out what the Board should do, monetarily and otherwise, in return for the teachers' agreeing to give up the tenure clause. This strategy worked, the parties reached agreement on the basis of the fact finder's recommendations, and the report never went public.

In many respects, this situation was a textbook illustration of the original theory of fact finding working properly. In this case, it worked properly because all the required elements were present: mature negotiations with well-defined and relatively few issues; one party staking out a position which allowed the fact finder to write a report which would have embarrassed them had it gone public; and a local news media that was paying close attention. In short, this fact-finding process had both the stick of potential public embarrassment and the carrot of a proffered settlement strongly argued for by the fact finder. Unfortunately, it need hardly be pointed out that this combination of circumstances is relatively unusual for fact finding under Bill 100.

6.

The Impact of Timing on the Effectiveness of Fact Finding

It was concluded in Chapter 4 that, for a variety of reasons, relatively little has been accomplished by many of the parties by September. Given s. 20 of the *act*, then, fact finding at some point in the fall term becomes a highly predictable event for those not settled. While it was argued in Chapter 4 that the lack of pre-fact-finding progress could not be attributed to fact finding itself to any significant degree, there is no doubt that this timing diminishes the effectiveness fo fact finding considerably.

The Negotiation Situation in the Early Fall

For those parties not able or willing to settle or at least get close to a settlement by June, whatever momentum may have existed then is lost as the parties cease negotiations for the summer. By the time negotiations resume, the provincial bargaining environment may well have changed and any urgency felt in the spring (that is, to conclude negotiations before the summer and avoid the long, drawn-out process in the fall) is gone. The parties, in a sense, have to get themselves reoriented and the process restarted, but with a somewhat changed environment, a new school year, and very little pressure on them to accomplish anything in the near term. Any such pressure would also be mitigated by the fact that the start of a new school year is a busy time for both parties, who are occupied by and concerned about more immediate problems.

More realistically, for many situations, it would appear that there simply never was any momentum at any time and, in one crucial respect, *negotiations are beginning – not ending or reaching impasse – in September*. That is to say, virtually nothing of any consequence has been settled and even much of the assessment and learning normally associated with Phase I of negotiations has been lost over the summer. While in this respect the negotiations are starting or restarting, in one other crucial respect, exactly the opposite is true: the parties have been negotiating for

what seems like a very long time and, while the pace may have been leisurely, the negotiators' patience with the process and with each other may well be wearing thin. In human terms, then, the mood may well not be conducive to pragmatism or compromise.

In sum, given the timelines for settlement under Bill 100, for a large number of situations, the early fall seems a singularly inappropriate time to impose fact finding – at least, in terms of a changed bargaining environment, a probable lack of bargaining momentum, the mood of the parties and the number of issues outstanding.

Informing the Public and Using Public Pressure

As noted in Chapter 1, the informing of the public with respect to important public-sector negotiations was thought by the drafters of the legislation to be a central and important role of the fact-finding process in Bill 100. Its importance was rooted in the belief that, if the public were properly informed of the positions taken by the parties in a bargaining impasse, it would then bring pressure to bear and compel the parties to compromise and resolve their impasse. Indeed, its importance *is* potentially great because it is the only source of power a fact finder has where one party (or both) is unwilling to compromise. It seems clear, however, that public reaction as a source of pressure on the parties has seldom been realized.

In this respect, the drafters of Bill 100 made an assumption which eleven years of experience have shown to be largely invalid. The drafters of Bill 100 assumed that, if there were to be a strike, it would follow the public release of the fact finder's report by a relatively short period of time. The record shows that, when strikes have occurred, they have followed fact finding by months rather than weeks.[40] While, under Section 63 of the Act the teachers can be in a position to strike as early as thirty days after receipt of the fact-finding report; in reality, this never happens. If a situation continues to move towards a strike, that point is typically arrived at long after the fact finder's report has come and gone. It has been overtaken by events and, for practical purposes, is a dead issue.

This particular facet of the process was explored in four questions on the parties' questionnaire. When asked if there was "general public interest in the fact-finding procedures." 83% of the respondents said there was not. With respect to the amount of news coverage accorded the fact-finding report when it went public, the parties responded as set out below:

Widespread coverage	12.5%
Moderate coverage	21.6%
Very little coverage	51.1%
Don't know	14.8%

40. For example, when the Wellington County strike began on Sept. 16th, 1985, the fact finder's report had been public information for six months. This is typical.

The parties were then asked, "if the report received news coverage, did this media attention have any effect on settlement?"

Great effect	3.9%
Moderate effect	3.9%
Little effect	19.7%
No effect	72.4%

Clearly, the above responses reflect very little public and media interest in the results of fact finding. Since this type of result was no surprise, the parties were also asked, "if the report did not receive widespread or moderate news coverage, what was the reason?" There was a significant pattern in the responses by both parties to this question, as exemplified in the following comments.

> . . . The negotiations of a small board are not particularly interesting until the word "strike" is mentioned.
> (Teachers)

> . . . Boredom? Lack of interest – just another set of negotiations?
> (Teachers)

> . . . Public is not interested in negotiation impasses, particularly of groups perceived to be well remunerated.
> (Board)

> . . . Lack of interest by the press.
> (Board)

What comes out very clearly from the questionnaires is that, in a significant majority of cases, the report becomes public so long before the parties are anywhere close to a real breakdown of negotiations – and therefore so long before there is any anticipation (by the fact finder, much less by the public) of a strike – there is simply very little public interest in the report. Accordingly, there is little news media interest. Most of the fact finders interviewed also felt this way, although many were unaware of the level of news media interest.

In short, the evidence seems incontrovertible that, while fact finding may have the *potential* to inform the public, in reality it often fails to do so because the reports generate little news media coverage. This failure is attributable to the fact that the report becomes public long before there is any real apprehension of a strike and the general lack of public interest in teacher-board negotiations at any other time. In other words, the informing-of-the-public function of fact finding is a casualty of the positioning and timing of the fact-finding process.

As reflected in the two cases outlined in Chapter 5, when the local news media *are* paying close attention to the negotiations and, therefore, when the fact finder can count on the media to carefully scrutinize and widely report the fact-finding report, the public release of the report can become a powerful pressure point.

That is not to say, however, that adequate news media coverage itself guarantees public pressure on the parties. The problem here is similar in principle to the pressure which builds during a strike. Unless one of the parties is clearly intransigent and has staked out a position perceived by the public to be untenable or unreasonable relative to the other party, then public pressure is going to be directed towards *both*

parties. This situation tends to be a weaker pressure point than if the bulk of public opinion is directed against *one* of the parties, as it would have been had the report gone public in Case B in Chapter 5.

On the other hand, even when public pressure is directed towards both parties, fact finding offers each of them an opportunity to get public opinion behind it: all one party has to do is to make it clear to the other party, and particularly to the public, that it is willing to settle on the terms proposed by the fact finder. That was the strategy adopted by the board in Case A in Chapter 5. In so doing, it went on the public record as being willing "to take the high ground", in order to prevent disruption of the system. Public support for the teachers' position was substantially weakened as a result and the credible grounds for a successful strike were mostly removed. One can surmise that, if a strike had actually occurred, public pressure would have been heavy and substantially directed against the teachers. However, as noted above, news media attention such as existed in these two cases is very much the exception.

Given the general lack of media and public interest in fact finders' reports as well as the fact that, in most cases, fact finders perceive the parties to be far from settlement (in terms of both number of issues and time), it is not surprising that most fact finders do not appear to make use of the strategy of embarrassment. A review of the fact-finding reports reveals that, other than in extreme or unusual cases, most fact finders seem to go out of their way to put observations and recommendations as inoffensively as possible. Strong language is used infrequently and, when it does appear, is almost always directed towards "the parties" rather than the board or the teachers specifically. In short, fact-finding reports often tend away from assigning blame and towards a certain blandness.

In its recent submission to the Legislative Committee, one board of education alluded to this problem:

> . . . fact finding can be a viable structure for a third party to use to bring the two sides in a dispute to a satisfactory settlement. The fact finding process should be streamlined in order that the third party neutral not only has the integrity in recommending resolutions but also has the authority to specify the party or parties that should make the concessions.

In one sense, this non-specific "blame-the-parties-together" approach is an entirely logical outcome of the situation faced by the fact finder. Knowing, first, by virtue of the very large number of items outstanding, etc., that it is highly improbable that the parties will *be able* to settle during the 15-day silent period, even if they wanted to and despite an appropriate and acceptable set of recommendations, and second, even if (when) the report goes public, little attention will be paid to it, the *threat* of the report's going public is automatically removed even before the process begins. That is, everyone involved *knows* that it is going to "go public".

Under such circumstances, then, it makes little sense strategically for a fact finder to try to exploit the embarrassment potential of the report's "going public." Indeed, that is likely to be counterproductive since it may serve only to enrage one of the parties, thus making it even less likely that the recommendations will be

accepted. Hence, the logical strategy flowing out of this reality makes much heavier use of rational and even-handed persuasion and less of the power of potential embarrassment than the theoretical model of fact finding assumes. In short, the potential marshalling of public opinion as a pressure point for one of both of the parties is a casualty of the positioning and timing of fact finding in the Bill-100 negotiation process.

7.

Summary and Conclusions

1. The principal collective pressure point in the Bill 100 process is June 30 or September [illegible]since under Bill 100, these are, in effect, the same date) and a major reason for this appears to be the threat of fact finding. Thus, fact finding brings about settlements in teacher-board bargaining disputes in the same way rights arbitration resolves grievances – by virtue of the incentive to avoid the process.

2. Settlements are attained in the immediate term in approximately 50% of the cases to which fact finding is assigned.

3. Fact finding is associated with a significant but indeterminate number of settlements further off into the future.

4. Fact finding under Bill 100 is effective in helping the bargaining process move forward, first, because the recommendations offer the parties the opportunity to settle some or all the outstanding issues. Along with this, however, goes a risk that a recommendation will be wrong, or overtaken by events, thus becoming an impediment to settlement.

5. Fact finding appears to be helpful in some cases because the process of fact finding forces the parties to approach and communicate their positions and the negotiations in a structured, credible and coherent fashion, sometimes for the first time. That is, it forces them to do what real negotiations require but which they may not yet have done.

6. Fact-finding recommendations are based on a blend of two principles – accommodations and equity. Accommodation searches for "the deal", while equity rests on objectively based criteria. The latter principle has influenced the character of teacher-board negotiations towards a more "principled" form where the influence of bargaining power is reduced and the power of objective criteria is enhanced.

7. Fact finding, under some circumstances, can change the direction of negotiations and, if negotiations are heading for a strike, can prevent that outcome. There is also

some risk, obviously, that the reverse can happen and that fact finding might make a strike more likely. There are no cases where a strike has actually been caused by fact finding, however.

8. While it is indisputable that, in many of the situations which go to fact finding, there has been little if any true negotiation ahead of time, fact finding itself is only one minor reason for this. The real explanation lies in the nature of the issues, the character of teacher-board negotiations, the absence of any pressure other than fact finding to settle before the expiry of the collective agreement, and the interruption of negotiations for the summer.

9. A key assumption upon which the dispute-resolution mechanism built into Bill 100 was based – that, if there was no settlement by the expiry of the agreement on August 31, there must be an impasse – has proven to be invalid, at least in the conventional sense of that term. In fact, the parties often are still in Phase I of negotiations on September 1.

10. A second assumption underlying the design of Bill 100 – that, if there was to be a strike, fact finding would precede it by only a short period – has also proved to be invalid. This is because, if fact finding occurs when the parties are still in Phase I, then the negotiation process must still exhaust itself, a time-consuming requirement at the best of times. Also, neither party – each for its own reasons – is anxious to rush to sanctions.

11. Because, often, little real negotiation has taken place prior to fact finding and the parties are often still in Phase I, fact finding is not as effective as it could be in bringing about settlements. There are two reasons for this. First, too many issues remain outstanding and there is not enough time to deal with them properly. Second, because the negotiations still have to pass through Phase II and into Phase III before settlement or strike and, therefore, any potential strike is likely to be months in the future, there is little public interest in the fact-finding report. As a result, one half of the theoretical strategy of fact finding – the "stick" of public exposure of unreasonable positions – is foreclosed from the outset and the fact finder must rely almost entirely on persuasion and the "carrot" of a possible settlement.

12. Negotiations under Bill 100 do not take any longer, on average, than negotiations as a whole in the Province of Ontario. The data suggest that they take somewhat longer than private-sector negotiations and less time than negotiations elsewhere in the public sector.

Conclusions

In terms of the effectiveness of fact finding in producing settlements, the above could be summed up by saying that the process does appear to help produce a significant number of settlements in the June and September periods but that, were it to come later in the bargaining process, it might produce even more (at least, a higher proportion of settlements in the situations to which it was assigned). For this reason, it is tempting to suggest – as many have before – that fact finding should

occur later so as to take place as short a time as possible before a strike. This could be accomplished, for example, by amending Bill 100 to make fact finding a third precondition to a legal strike, just as the last-offer-received and strike votes are now. The advantages of this approach would be both more mature negotiations with fewer items outstanding and, most important, the public and the news media would be paying attention, thus arming the fact finder with both the carrot and the stick.

On the other hand, one should be careful because, in making such a change, one would be trading one set of advantages for another. With full use of the "stick", fact finding positioned immediately prior to a strike might well have a higher batting average of settlements but, by moving fact finding away from September and October, a major pressure point would be removed, and it is probable that significantly fewer settlements would occur in June and September and, coincidentally, more situations would remain unsettled into November, December and the new year. It is also probable that more of these would find themselves in serious difficulty.

The principal argument for positioning fact finding later in the process is that, with a strike on the horizon, the public would be paying close attention and the fact finder would be writing for a very interested audience, thus arming him/her with the stick as well as the carrot. There may be other ways of bringing this about. For example, copies of the fact finder's report could be sent to *all* trustees and *all* members of the branch affiliate. This might enhance the power of embarrassment, if not through the public, then through the two constituencies. This principle could be carried one step further by adopting the Ohio model and requiring the parties to explicitly reject or accept the recommendations, through supervised votes of each entire constituency. There are many variations on this theme.

Finally, since it has been suggested so often (including in the parties' questionnaires) that fact finding should not even exist in the process, that question itself should be examined. Perhaps the best way of answering is to hypothesize the system without fact finding. Is there the slightest evidence – anywhere – that, in the absence of fact finding, the parties would make faster or better progress in their negotiations? There may be, but it is certainly not obvious. Indeed, the data would suggest that, in the absence of fact finding, many more negotiation situations would simply remain unsettled into late fall and winter and, ultimately, there would be more breakdowns and sanctions. The reality may be, simply, that the parties will change their time of settlement only if the pressure points are changed in Bill 100, and removing fact finding would serve only to remove the June/September pressure point.

There is another important dimension to this question. It was argued in Chapter 2 that the equity principle underlying fact finding recommendations influences the character of teacher-board collective bargaining in Ontario; that bargaining outcomes in this sector are less a function of bargaining power and more a function of objective criteria than they otherwise would be or than they are in the private sector. It is principally fact finding which brings this about and it is, arguably, a healthy and positive aspect of the bargaining process which, one can surmise, was very much in the minds of those who drafted Bill 100.

Perhaps one final comment with respect to the parties' hostility to fact finding is in order, as well as necessary as a context for an evaluation of fact finding. It is

important to understand just what it is, *in real terms*, that the fact finder is doing when s/he is appointed to a bargaining situation. It is suggested that the fact finder is doing the following:

1. The fact finder is there to look over the shoulders of the parties and to monitor and evaluate what they have been doing and to make what is likely to be a public report on what they have been doing.

2. The fact finder is there, in a sense, to "blow the whistle" on the parties if he or she feels one or both have been negotiating incompetently, irresponsibly or intransigently.

3. Finally, while the fact finder is euphemistically said to be there to "help the parties", what this *really* means is that s/he is there to help the *process*, which often means that the fact finder's *real* job is to try to force one or both of the parties to do things that they do not wish to do.

Looked at in this light, if fact finding is not popular with some of the parties, it is hardly surprising.

While this research focussed on the process of fact finding, the author would like to close with an observation with respect to the Bill-100 system as a whole. That comment is this: if one looks at the Bill-100 process objectively, realistically and in proper context, the evidence suggests very strongly that it is a very good system.

First of all, it is a system which has taken the complete anarchy of Ontario teacher-board collective bargaining in the 1970-75 period and transformed it into an ordered and controlled, if still imperfect, process. Second, that process has produced settlements *without sanctions* approximately 98% of the time; this strike rate of 2% should be viewed against a strike rate of 10 to 14% for the collective bargaining population as a whole. Third, for all one hears about the excessive length of teacher-board negotiations, the data show that, in terms of *actual* negotiation time, they are not substantially longer than the rest of the collective-bargaining population.

Fourth, it is a system which has preserved a high degree of local autonomy for both trustees and teachers. The principal reason Bill 100 did not have compulsory arbitration as its final dispute-resolution mechanism was that both teachers and trustees objected to arbitration for a variety of reasons, not the least of which (particularly for the trustees) was a surrendering of local responsibility to an outsider. When one looks at systems which do have arbitration, that objection seems to have been well founded. In the Ontario police sector, for example, the proportion of negotiations settled by outside arbitrators over the last three years has ranged between 17 and 35%.

All of this should be put in the context of the fact that the Ontario education system is an intrinsically difficult environment in which to bargain. Public-sector negotiations are difficult anyway because they are so open, none more so than those in education; money has been chronically short; the issues at stake are complex and

intractable; and the education system itself has been under seemingly constant change from without, making it a very turbulent environment which regularly confronts those bargaining within it with difficult new issues. Viewed in this contest, the record is an enviable one.

In summary, the Bill 100 system has replicated the private-sector collective-bargaining model in that it has created a process in which the parties make their own decisions. Those decisions are difficult; they are agonizing; but the important thing is that they are made by the two parties themselves, and not imposed from without. That trustees and teachers could resolve such intractable issues in the context of such a turbulent institutional and bargaining environment, with a break-down rate of only 2%, at the very least suggests that the system is working comparatively well. It is submitted that the process of fact finding, if not "the backbone" of the process, as envisaged in 1975, has at least contributed substantially to it.

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Appendix: Questionnaire Used in the Study

Introduction

Many of the questions relate to specific rounds of negotiations. Where that is the case, a set of possible answers pertaining specifically to each round has been provided. Please select only one response and indicate your response by circling the appropriate number in the year you were bargaining for a particular contract. For example, if you negotiated for the 86–87 contract, (i.e. actual negotiations started in Jan. '86), then select the response under the 86–87 year.

1. Questionnaire Respondent:

   a) Secondary Teacher Representative 1
   b) Elementary Teacher Representative 2
   c) RCSS Teacher Representative 3
   d) Board Representative 4

2. What was your function with respect to the negotiations?

   a) Chief Negotiator 1
   b) Member of the bargaining committee 2
   c) Resource person 3
   d) Other (please specify) _____ 4

3. If you did not have single-year contracts for each of the 84–85, 85–86, 86–87 years, please indicate which years formed or were part of multi-years agreements.

   a) 83–84 and 84–85 1
   b) 85–86 and 86–87 2
   c) 84–85 and 85–86 3
   d) 86–87 and 87–88 4
   e) 84–85, 85–86, and 86–87 5

		84–85	85–86	86–87
4.	During that year in which you were involved in the negotiations, did the parties reach an *ACTUAL* impasse BEFORE the fact finder was appointed?			
	a) Yes	1	1	1
	b) No	2	2	2
5.	Approximately how many negotiation sessions had there been prior to the fact finding appointment or hearing?	84–85	85–86	86–87
	_____	____	____	
6.	How many of the outstanding issues had been thoroughly discussed before the fact finding hearing?	84–85	85–86	86–87
	a) All of the issues	1	1	1
	b) Most of the issues	2	2	2
	c) A few of the issues	3	3	3
	d) None of the issues	4	4	4
7.	What effect did the prospect of fact finding have on PRIOR negotiations?	84–85	85–86	86–87
	a) Sped up negotiations	1	1	1
	b) Delayed serious bargaining	2	2	2
	c) Had no effect	3	3	3
	d) No opinion/don't know	4	4	4
	e) Other (please specify) _____	5	5	5
	_____			
8.	Did you feel that the appointment of a fact finder was necessary in that case?	84–85	85–86	86–87
	a) Yes	1	1	1
	No	2	2	2
9.	How far did the fact finding process proceed?	84–85	85–86	86–87
	a) An agreement was reached before the fact finder received written notice of the items in dispute	1	1	1
	b) The items in dispute were sent to the fact finder but an agreement was reached before the fact finder met with the parties	2	2	2
	c) The fact finder met with the parties but an agreement was reached before a report was written	3	3	3
	d) The fact finder's report was sent to the parties but not made public	4	4	4
	e) The fact finder's report was released to the public	5	5	5
10.	Was there general public interest in the fact finding procedures?	84–85	85–86	86–87
	a) Yes	1	1	1
	b) No	2	2	2

11. If the fact finder's report was made public, how much news coverage did it receive in the Board area?

	84–85	85–86	86–87
a) Widespread coverage	1	1	1
b) Moderate coverage	2	2	2
c) Very little news coverage	3	3	3
d) Don't know	4	4	4

12. *If the report received news coverage*, did this media attention have any effect on settlement?

	84–85	85–86	86–87
a) Great effect	1	1	1
b) Moderate effect	2	2	2
c) Little effect	3	3	3
d) No effect	4	4	4

13. *If the report did not receive widespread or moderate news coverage*, what was the reason?

_____

_____

_____

_____

Timing of Fact Finding

14. Do you feel that the fact finding process should automatically take place "forthwith" if the parties have not attained an agreement by August 31st, as is the case under Bill 100?

a) Yes	1
b) No	2

15. If not, should the automatic trigger date by earlier or later than August 31st? Or should there be no automatic trigger date?

a) Earlier (specify) _____	1
b) Later (specify) _____	2
c) No automatic trigger date	3

16. If the process should not be triggered automatically on a particular date, then how should it be triggered?

a) Upon the joint request of the parties	1
b) Upon the request of one party	2
c) Upon independent assessment by the E.R.C.	3
d) Upon a final offer or strike vote by the teacher	4
e) Other (specify) _____	5

_____

17. Should fact finding be nothing other than a precondition to sanctions (in the way that conciliation, while not itself mandatory, is a precondition to a strike under the Ontario *Labour Relations Act*)?

a) Yes	1
b) No	2

18. After receipt of the fact finding report, is the 15 day silent period (with a possible 5-day extension on agreement of both parties) long enough for meaningful negotiations?

a) Yes	1
b) No (specify period) _____	2

19. Should public release of the report by triggered by something other than the expiry of a given number of days?

a) Yes	1
b) No	2

20. If yes, then who or what should trigger its release (assuming this could not happen before the end of a minimum 15-day silent period)?

a) The fact finder	1
b) Both parties	2
c) Either party	3
d) A Mediator	4
e) The E.R.C.	5
f) Other (specify) _____	6

21. Do you have any other suggestions, comments, or criticisms about the timing of fact finding?

_____

_____

_____

_____

Evaluation of Fact Finding

22. *BEFORE* you entered fact finding, how effective did you think it would be in reaching a settlement?

	84–85	85–86	86–87
a) Very effective	1	1	1
b) Effective	2	2	2
c) Not very effective	3	3	3
d) Ineffective	4	4	4
e) Uncertain	5	5	5

f) Not applicable 6 6 6

Please explain your answer to the above question:

_____

_____

_____

_____

23. How effective was fact finding in reaching a settlement?

	84–85	85–86	86–87
a) Very effective	1	1	1
b) Effective	2	2	2
c) Not very effective	3	3	3
d) Ineffective	4	4	4
e) Uncertain	5	5	5
f) Not applicable	6	6	6

Please elaborate your answer:

_____

_____

_____

_____

24. In your opinion, did fact finding affect the probability of a sanction (including work to rule)?

	84–85	85–86	86–87
a) Increased the probability of a sanction	1	1	1
b) Decreased the probability of a sanction	2	2	2
c) No effect	3	3	3

The Fact Finding Process

Did the fact-finding *process* (i.e. the parties' preparations for fact finding and the meetings with the fact finder):

25. force *your* party to consolidate and clarify its position on the issues outstanding?

	84–85	85–86	86–87
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4

	84–85	85–86	86–87
26. force the *other* party to consolidate and clarify its position on the issues outstanding?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
27. force *your* party to reevaluate its position on the issues outstanding?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
28. force the *other* party to reevaluate its position on the issues outstanding?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
29. cause *your* party to modify its position on any issues outstanding?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
30. cause the *other* party to modify its position on any issues outstanding?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
31. foster greater understanding between parties?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4
32. clarify the status of the bargaining situation for the parties?			
a) To a very high degree	1	1	1
b) To a high degree	2	2	2
c) To a limited degree	3	3	3
d) Not at all	4	4	4

33. Which of the following two fact-finding approaches do you prefer?

a) A fact finder who comes in thoroughly prepared, knowing the specific issues outstanding and the parties' rationale ahead of time 1
b) A fact finder who know nothing about the situation other than which issues are outstanding 2
c) Others (please specify) 3

_____

_____

34. *IN GENERAL*, how formal would you prefer the hearing to be?

a) Highly formal 1
b) Somewhat formal 2
c) Informal 3
d) Highly informal 4

35. Typically, the fact finder will meet with the parties jointly, after which s/he will meet privately with each of the parties. Do you have any observations, suggestions, or criticisms to make of this approach?

_____

_____

_____

_____

36. Are there any variations you have experienced or would like to see?

_____

_____

_____

_____

Mediation During Fact Finding

37. Did the fact finder attempt to *mediate* (broadly defined) the dispute during fact finding?

	84–85	85–86	86–87
a) Yes	1	1	1
b) No	2	2	2

38. *If you answered 'no' to Q37, please go to Q44. If you answered 'yes' to Q37*, how effective was the mediation?	84–85	85–86	86–87
a) Very effective	1	1	1
b) Effective	2	2	2
c) Not very effective	3	3	3
d) Ineffective	4	4	4
e) Uncertain	5	5	5

39. Was the fact finder's mediation helpful in clarifying the other party's position on the items in dispute?	84–85	85–86	86–87
a) Very helpful	1	1	1
b) Of some help	2	2	2
c) Of little help	3	3	3
d) Of no help	4	4	4

Did the fact finder's mediation assist in:

40. reducing the number of issues in dispute?	84–85	85–86	86–87
a) Substantially	1	1	1
b) Somewhat	2	2	2
c) Not at all	3	3	3

41. narrowing the gap between the parties?	84–85	85–86	86–87
a) Substantially	1	1	1
b) Somewhat	2	2	2
c) Not at all	3	3	3

42. fostering greater understanding between the parties?	84–85	85–86	86–87
a) Substantially	1	1	1
b) Somewhat	2	2	2
c) Not at all	3	3	3

43. Other (please specify)

_____

_____

The Fact Finding Report

If the factfinder wrote a *report*, how helpful was the report in:

44. identifying the items in dispute?	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

45. clarifying the other party's position on the items in dispute?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

46. setting out a potential settlement?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

47. exposing an unreasonable or unwise position of the other party?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

48. pointing out process problems in the negotiations?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

49. helping either of the negotiating teams deal with the expectations of its own constituents?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

50. reducing the number of issues in dispute?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

51. narrowing the gap between the parties?

	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

52. fostering greater understanding between the parties?	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

53. clarifying the status of the bargaining situation for the parties?	84–85	85–86	86–87
a) Of great assistance	1	1	1
b) Of some assistance	2	2	2
c) Of little assistance	3	3	3
d) Of no assistance	4	4	4

Recommendations Made by the Fact Finder

54. Did the fact finder's report contain one or more recommendations?	84–85	85–86	86–87
a) Yes	1	1	1
b) No	2	2	2

If the fact finder's report contained one or more recommendations, what was your general impression of the recommendation(s) with respect to the following (please respond to each of the items listed below):

55. Acceptability to the group you represent:	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

56. Fairness to both parties:	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

57. Comparability to neighbouring boards:	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

58. Comparability to trends in the teaching sector more generally:	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

59. Comparability to trends in the non-teaching areas of the labour force:

	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

60. Sensitivity to local economic conditions:

	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

61. Adequacy of rationale for recommendations:

	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

62. Practicality of implementation:

	84–85	85–86	86–87
a) High degree	1	1	1
b) Moderate degree	2	2	2
c) Low degree	3	3	3
d) No opinion	4	4	4

63. *IN GENERAL*, do you feel that fact finders should make recommendations for resolving issues still in dispute?

a) Yes, always	1
b) Yes, usually	2
c) Yes, but only on relatively minor issues	3
d) Yes, but only on relatively major issues	4
e) No, never	5
f) Don't know	6
g) Other (please specify)	7

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_____

Please amplify or make any other comments, if you wish:

_____

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64. If a fact finder chooses to make recommendations, how specific should they be?

a) Very specific 1
b) Fairly specific 2
c) Just a general guideline for further negotiations 3
d) Don't know 4
e) Other (please specify) 5

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_____

Please explain your answer to the above question:

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65. *Generally speaking*, are you in favour of fact finders writing hard-hitting, decisive reports?

a) Yes, definitely so 1
b) Yes, but only when the situation warrants it 2
c) Only in rare situations 3
d) No, never 4
e) Don't know 5
f) Other (please specify) 6

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_____

Please elaborate on your answer to the above question:

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66. *Generally speaking*, if a fact finder chooses to make recommendations, how should he/she make these recommendations?

a) Issue-by-issue basis 1
b) Package recommendation 2
c) Issue-by-issue within overall package 3

d) Other (please specify) 4

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Please elaborate on your answer to the question above:

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IN GENERAL, how helpful do you feel the fact finder's recommendations are on the following issues:

67. Salary grids

a) Very helpful
b) Somewhat helpful 1
c) Not very helpful 2
d) Least helpful 3
4

68. Benefits

a) Very helpful
b) Somewhat helpful 1
c) Not very helpful 2
d) Least helpful 3
4

69. Working conditions

a) Very helpful
b) Somewhat helpful 1
c) Not very helpful 2
d) Least helpful 3
4

70. Staffing

a) Very helpful
b) Somewhat helpful 1
c) Not very helpful 2
d) Least helpful 3
4

71. Retirement gratuity

a) Very helpful
b) Somewhat helpful 1
c) Not very helpful 2
d) Least helpful 3
4

72. Other issues (please specify)

_____

_____

73. *In general*, what do you think that the majority of the fact finder's recommendations, taken as a whole, were based on? (Choose only one response.)

	84–85	85–86	86–87
a) The fact finder's own judgment of what was "*RIGHT*" under the circumstances	1	1	1
b) The fact finder's judgment of what was *ACCEPTABLE* to the parties	2	2	2
c) Other (please specify)	3	3	3

_____

_____

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Q74 to be answered only in situations where the fact finder's report went public.

74. During the interval between the receipt of the fact finder's report and its public release, did the report: (please select only one response)

	84–85	85–86	86–87
a) Serve as the basis of settlement	1	1	1
b) Serve as a guideline for further negotiations	2	2	2
c) Contribute little toward the resolution of the dispute	3	3	3
d) Create additional problems for negotiations	4	4	4

75. In the space given below or on additional sheets, please feel free to comment on any aspect of the fact-finding process under Bill 100 – strengths, weaknesses, suggestions for improvements, etc.

Thank you very much for taking the time to complete this questionnaire. If there are any questions on the survey that you ar unsure of, or if there is anything else you would like to discuss about fact finding, please call Professor Jackson (collect) at (613) 545-2327.